SHDKT PROCEEDINGS AND ORDERS DATE: [02/11/92]

CASE NBR: [90101440] CFX STATUS: [DECIDED]
SHORT TITLE: [Hunter, Brian, et al.]
VERSUS [Bryant, James] DATE DOCKETED: [031291]
PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Jan 23 1991	G	Application (A90-567) to extend the time to file a petition for a writ of certiorari from February 3, 1991 to March 5, 1991, submitted to Justice O'Connor.
2	Jan 24 1991		Application (A90-567) granted by Justice O'Connor extending the time to file until March 5, 1991.
3	Feb 22 1991	G	Application (A90-567) to extend further the time to file a petition for a writ of certiorari from March 5, 1991 to March 12, 1991, submitted to Justice O'Connor.
4	Feb 22 1991		Application (A90-567) granted by Justice O'Connor extending the time to file until March 12, 1991.
5	Mar 12 1991	G	Petition for writ of certiorari filed.
6	Apr 24 1991		DISTRIBUTED. May 9, 1991
7	May 7 1991	P	Response requested -- CJ, BRW. (Due July 15, 1991)
8	Jun 4 1991		Order extending time to file brief of respondent on the merits until July 8, 1991.

PREVIOUS 1 1 EXIT

Last page of docket

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	DATE	NOTE	PROCEEDINGS & ORDERS
9	Jul 11 1991		Order further extending time to file brief of respondent on the merits until July 15, 1991.
10	Aug 7 1991		REDISTRIBUTED. September 30, 1991
12	Oct 7 1991		REDISTRIBUTED. October 11, 1991
14	Oct 15 1991		REDISTRIBUTED. October 18, 1991
16	Oct 28 1991		REDISTRIBUTED. November 1, 1991
17	Oct 29 1991		Record requested.
18	Dec 11 1991		REDISTRIBUTED. December 13, 1991
19	Dec 16 1991		Petition GRANTED. Judgment REVERSED. Concurring opinion by Justice Scalia. Dissenting opinion by Justice Stevens. Dissenting opinion by Justice Kennedy. Opinion per curiam. Justice Thomas OUT. **********
20	Jan 16 1992		Judgment issued.

(1)

No. 90-1440

In the Supreme Court of the United States

OCTOBER TERM, 1990

BRYAN V. HUNTER, ET AL., PETITIONERS

v.

JAMES V. BRYANT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JEANNE S. ARCHIBALD
General Counsel

DENNIS I. FOREMAN
Deputy General Counsel
Department of the Treasury
Washington, D.C. 20220

JOHN J. KELLEHER
Chief Counsel
United States Secret Service
Washington, D.C. 20223

QUESTION PRESENTED

Respondent was arrested by petitioners for threatening the life of the President of the United States in violation of 18 U.S.C. 371. He then brought this *Bivens* action against petitioners, claiming that the arrest was without probable cause and therefore violated the Fourth Amendment. Petitioners submitted affidavits setting forth in detail the undisputed facts surrounding the arrest and moved for summary judgment on grounds of qualified immunity. The question presented is:

Whether the court of appeals departed from the requirements of this Court's decisions when it denied petitioners' claim of qualified immunity on the ground that its own, after-the-fact interpretation of events was "more reasonable" than that of petitioners.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Jeffrey Jordan was a defendant and appellant in this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No.

BRYAN V. HUNTER, ET AL., PETITIONERS

v.

JAMES V. BRYANT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Brian V. Hunter and Jeffrey Jordan, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-34a) is reported at 903 F.2d 717. The decision of the district court (App., *infra*, 35a-39a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1990. A petition for rehearing was denied on November 5, 1990. On January 24, 1991, Justice O'Connor extended the time for filing a petition for a writ of certiorari for 30 days to March 5, 1991. On February 22, 1991, Justice O'Connor further extended the time for filing a petition for a writ

of certiorari to and including March 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. 871 provides, in relevant part:

> **§ 871. Threats against President and successors to the Presidency**
>
> (a) Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

1. On May 3, 1985, respondent James V. Bryant delivered copies of a rambling, incoherent, 13-page letter (App., *infra*, 16a-24a) to two offices at the University of Southern California (USC). In several places, the letter referred to past and future plots by a "Mr. Image"—asserted to be "Communist white men within the 'National Council of Churchs[']" (*id.* at 16a)—to assassinate then-President Reagan. The letter states that "Mr Image wants to murder President Reagan on his up and coming trip to Germany." *Id.* at 20a. The letter added that "Mr Image had conspired with a large number of U.S. officials in the plot to murder President Reagan." *Id.* at 22a. Later, the letter asserted that "Mr Image (NCC) still plans on murdering the President on his trip to Germany in May, 1985." *Id.* at 24a; see also *id.* at 22a. The letter stated that the writer has "expos[ed] the conspiracy" (*id.* at 24a) and claimed that the writer was strongly opposed to "Mr Image"" and his various plans.

2. A USC police sergeant telephoned the Secret Service to inform it of the letter.[1] Petitioner Bryan Hunter, a Secret Service agent assigned to the protective intelligence squad—the squad designated to investigate threats upon the President and other individuals protected by the Secret Service (see 18 U.S.C. 3056(a))—received the call. As detailed in undisputed portions of his affidavit, Agent Hunter

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[1] Since 1901, shortly after the assassination of President McKinley, the Secret Service has been responsible for protecting the President. W. Bowen & H. Neal, *The United States Secret Service* 126 (1960). In 1913, Congress first enacted legislation giving statutory sanction to the Secret Service's protective function. 38 Stat. 23. That authority is currently codified at 18 U.S.C. 3056(a).

responded to the call the same day, obtaining copies of the letter from the USC police sergeant.[2] App., *infra*, 42a.

After reading the letter, Agent Hunter interviewed the two USC employees who had received copies of the letter. App., *infra*, 43a. One of them told Hunter that the man who had given her the letter "made statements about 'bloody coups' and 'assassination,'" and "said something about 'across the throat,' while simultaneously moving his hand horizontally across his throat to simulate a cutting action." *Id.* at 43a. The other employee said that the man who delivered the letter had identified himself as James V. Bryant and "told her that '[h]e should have been assassinated in Bonn.'" *Id.* at 43a. At the time, the President was traveling in Germany.

Hunter decided to investigate further, in light of the then-present concerns about Libyan "hit squads" (mentioned in the letter, see App., *infra*, 22a), as well as the facts that the author of the letter was apparently familiar with the President's movements and that the President himself frequently visited the Los Angeles area and maintained a home in Santa Barbara. *Id.* at 43a-45a.

Hunter obtained the assistance of another agent, petitioner Jeffrey Jordan, and visited one of the addresses listed on the letter. App., *infra*, 45a, 50a. Respondent Bryant came to the door and gave the agents permission to come in. *Id.* at 45a, 51a. In response to the agents' questions, Bryant said that he was alone and had no weapons, and Bryant gave Agent Hunter permission to make a "protective sweep" of the apartment to determine if anyone was present. No weapons or other people were found. *Id.* at 45a-46a, 51a-52a.

[2] Although Bryant disputed the interpretation Agents Hunter and Jordan placed on his letter, he did not submit an affidavit or other matter disputing the facts concerning the actions taken by Hunter and Jordan prior to arresting him. Accordingly, under Fed. R. Civ. P. 56(e), those facts must be taken as true for purposes of petitioners' summary judgment motion.

In response to questions from Agent Hunter, Bryant admitted writing the letter and delivering the two copies at the USC campus. However, he responded to questions about "Mr. Image" "in a rambling and confused manner [and] refus[ed] to identify Mr. Image." App., *infra*, 46a, 52a. Bryant then gave Agent Hunter permission to search the apartment and, in the course of the search, Agent Hunter found the original of the letter. *Id.* at 46a. Meanwhile, in response to Agent Jordan's questions, Bryant "refused to answer any questions concerning his attitudes and feelings towards the President, and refused to state whether he intended to harm the President." *Id.* at 53a. When Hunter completed his search, Jordan advised Bryant of his rights, and Bryant consented to continue speaking to Jordan and Hunter. Bryant again responded in "the same rambling and confused fashion" to further questions concerning the existence and identity of Mr. Image and to questions concerning Libyan hit squads and a planned attempt to assassinate the President. *Id.* at 46a-47a, 53a.

Agents Hunter and Jordan then arrested Bryant. They advised an Assistant United States Attorney of the arrest, and were informed that they should bring Bryant before a magistrate on Monday, May 6, 1985, for his arraignment on a criminal complaint. App., *infra*, 48a, 55a. Bryant was held in custody pending the arraignment. On May 6, 1985, Bryant was arraigned for threatening the life of the President, in

violation of 18 U.S.C. 871. App., *infra*, 48a-49a, 55a. Bryant was held without bond until May 17, 1985, when the criminal complaint was dismissed on the government's motion and he was freed. *Id.* at 4a.

3. On May 15, 1986, Bryant instituted this action and on January 27, 1987, he filed an amended complaint, naming agents Hunter and Jordan, the United States Department of the Treasury, and the Director of the Secret Service as defendants. The amended complaint sought recovery under the Federal Tort Claims Act (FTCA) and on the theory that petitioners' conduct had violated the Fourth, Fifth, Sixth, and Fourteenth Amendments. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court dismissed the FTCA causes of action for lack of jurisdiction, dismissed all defendants other than petitioners, and dismissed Bryant's claims under the Fifth, Sixth, and Fourteenth Amendments. App., *infra*, 39a. But the district court denied motions by petitioners Hunter and Jordan for summary judgment on qualified immunity grounds as to Bryant's remaining Fourth Amendment claims for arrest without probable cause and without a warrant. The court held that further fact-finding was necessary before it could determine whether petitioners were entitled to qualified immunity with respect to those claims. App., *infra*, 38a-39a.

4. Petitioners took an interlocutory appeal to the Ninth Circuit. See *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). A divided panel of the court of appeals affirmed in part and reversed in part.

a. In a portion of its opinion discussing general legal principles, the court noted that the issue in this case is "whether a secret service officer, in light of

clearly established law at the time of Bryant's arrest * * *, reasonably could have believed that the information possessed by the arresting agents constituted probable cause to support an arrest under 18 U.S.C. 871 for threatening the life of the President." App., *infra*, 5a.[3] Acknowledging that "it is essential that qualified immunity claims be resolved at the earliest possible stage of litigation" (App., *infra*, 9a), the court nonetheless held that "it was proper for the [district] court to require further development of the facts to determine whether the secret service reasonably could have interpreted [Bryant's] letter as violating § 871." App., *infra*, 9a-10a. The court observed that violation of Section 871 "turns not on whether the individual actually intended to harm the president, but whether a reasonable person would interpret the words used as a threat." App., *infra*, 10a.

b. Turning to the facts of this case, the court stated that petitioners' argument for qualified immunity rests on their allegations that Bryant admittedly wrote and delivered a letter containing references to an assassination attempt on President Reagan, that President Reagan frequently visited the Los Angeles area, and that "based on their training and experience as Secret Service agents, they believed 'Mr. Image' could be a pseudonym for Bryant." App.,

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[3] The court recognized that it was unclear whether the district court had required factual development to resolve the issue of whether there was in fact probable cause for the arrest or to determine "if the officers reasonably could have believed they had probable cause." App., *infra*, 6a n.3. The court characterized the former inquiry as "improper" and the latter inquiry as "the proper standard." *Ibid.*

infra, 11a. The court, however, rejected the agents' conclusion, holding instead that:

> A *more reasonable* interpretation of the letter might be that Bryant was trying to convince people of the danger Mr. Image and the conspiracy posed rather than that Bryant was speaking through Mr. Image.

Id. at 11a (emphasis added). The court supported this conclusion by noting that (1) the letter purported to be about the threat posed by "Mr. Image," a person of whom the writer of the letter appears to disapprove, and (2), at least in the court's view, "there was absolutely nothing in the surrounding circumstances to suggest a different reading of the letter." *Ibid.*

c. Noting that discovery might be limited to issues relevant to the qualified immunity issue, the court observed that "[i]f further development of the record occurs prior to trial, it is possible that renewal of defendants' motion for summary judgment at a later date might be appropriate." App., *infra*, 12a. As examples of facts that might establish qualified immunity, the court referred to information "about what knowledge Secret Service officers possess as a result of their professional training about communications by thought disordered persons as well as any information they may have possessed about Bryant." *Ibid.*

d. Finally, in a portion of the opinion in which the panel was unanimous, the court rejected Bryant's claim that under clearly established law a warrantless arrest inside his residence violated the Fourth Amendment's warrant requirement, even where—as here—he had consented to the agents' entry into his house. App., *infra*, 13a-15a; 34a (Trott, J., dissenting in part). The court found that, to the contrary, the case law suggests that the officers could "have believed that their warrantless arrest was lawful so long as they had probable cause and consent to enter the residence." *Id.* at 14a.

e. Judge Trott dissented. He argued that whereas the majority "measur[ed] what confronted Hunter and Jordan in the field by rational standards", in his view it was precisely the threat posed by unbalanced individuals who do not exhibit rational thought processes—John Hinckley, for example—that the Secret Service should be most concerned about. App., *infra*, 25a.

Judge Trott pointed out that the probable cause standard is a "pragmatic" one (App., *infra*, 28a-29a), and urged that, in the context of Section 871, this standard requires consideration of the crucial importance of the Secret Service's mission. Citing a previous case of an individual with multiple personalities and alter egos who had committed multiple murders (see App., *infra*, 31a-32a), he argued that reasonable people could differ about whether Bryant —or at least some aspect of his personality—had threatened the President.

Judge Trott pointed out that there was no case law concerning "the contours of probable cause to make an arrest for a violation of section 871" and that consequently there was no "clearly established" law that the agents had violated. App., *infra*, 32a-33a. He also noted that a magistrate had agreed with the agents that they had probable cause, and had ordered plaintiff held for 14 days. *Id.* at 33a. He observed that there was no evidence that the agents were acting in bad faith. *Ibid.* Indeed, in Judge Trott's view, the agents had probable cause to arrest

Bryant. *Ibid.* *A fortiori*, they were entitled to qualified immunity.

REASONS FOR GRANTING THE PETITION

Petitioners are entitled to summary judgment on qualified immunity grounds if "a reasonable officer could have believed [Bryant's arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). In turn, Bryant's arrest was lawful if "the facts and circumstances * * * were sufficient to warrant a prudent man in believing that [Bryant] had [violated 18 U.S.C. 871]." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

Although portions of the Ninth Circuit's opinion correctly set out these general legal principles, the operative portion of the court's opinion applied a dramatically different standard. Rather than determining whether a reasonable agent in petitioners' position could have interpreted the facts and circumstances as they did, the court posited its own interpretation of events and then found that, under this "more reasonable interpretation," Bryant had not violated Section 871. App., *infra*, 11a. The error of this approach is manifest. There is simply no place in a qualified immunity analysis for a court to determine whether its interpretation of events is "more reasonable" than that adopted by the officers being sued. Had the court undertaken to determine whether petitioners' interpretation was itself reasonable, the court would have realized that the undisputed facts of this case establish petitioners' right to qualified immunity.

The Ninth Circuit's analysis directly contravenes decisions of this Court, and is supported by no other

appellate decision. Moreover, the court's decision threatens to chill enforcement of 18 U.S.C. 871, a vital tool in protecting the President and others in line of succession. Thus, the decision below is one of exceptional importance. But the error in the court's rationale, and in its result, is so plain that we have some doubt that plenary review would be warranted. We therefore urge that the decision of the Ninth Circuit be summarily reversed.

1. Federal officials sued for damages in their personal capacity in a *Bivens* action are entitled to assert the defense of qualified immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Malley* v. *Briggs*, 475 U.S. 335 (1986); *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967). Under that standard, which provides the "best attainable accommodation of competing values" (*Harlow*, 457 U.S. at 814), petitioners are not immune "[i]f, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [there was probable cause for Bryant's arrest]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley* v. *Briggs*, 475 U.S. at 341.

An essential feature of the qualified immunity standard is that it does *not* permit a damages action against a public official to proceed simply because a plaintiff has claimed that an after-the-fact judicial inquiry would disclose that his constitutional rights had been violated. Such a result could lead to unduly timid law enforcement; the official forced to defend a suit and faced with the possibility of a substantial money judgment would be given a very powerful incentive to "err always on the side of caution." *Davis* v. *Scherer*, 468 U.S. 183, 196 (1984). "[T]he danger of being sued [would] 'dampen the ardor of

all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814. Accordingly, "the qualified immunity defense * * * provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.[4]

Thus, this case does not raise the issue of whether petitioners were mistaken in their interpretation of events. Its resolution did not require the court of appeals to determine whether the court—in hindsight—believed Bryant's arrest to be wise, prudent, or necessary, and the court of appeals erred in deciding the issue on that basis.

2. The nature of the probable cause standard that governs the legality of Bryant's arrest reinforces the conclusion that the Ninth Circuit erred in substituting its judgment for that of petitioners. For the probable cause standard is itself responsive to the same considerations as the qualified immunity standard: the need to safeguard the ability of law enforcement officers "to take effective action" to "protect[] the public interest by enforcing the law." *Brinegar* v. *United States*, 338 U.S. 160, 174 (1949).

Thus, this Court has recognized that, because "many situations which confront officers in the

[4] Accord *Anderson*, 483 U.S. at 641 (it is "inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present"); *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974) ("Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.").

course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." *Brinegar* v. *United States*, 338 U.S. at 176. So long as "the mistakes [are] those of reasonable men" (*ibid.*), such mistakes will not render unconstitutional an otherwise proper arrest. In determining probable cause, law enforcement agents are authorized to base arrests on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 175. In a time-honored formulation, the existence of probable cause depends on an assessment of "whether at [the moment the arrest was made] the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [the person arrested] had committed or was committing an offense." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).[5] Accord *Carroll* v. *United States*, 267 U.S. 132, 162 (1925).

3. As Judge Trott noted (App., *infra*, 32a-33a), the lack of case law applying the probable cause standard in the context of Section 871 counsels in favor of petitioners' claim that they reasonably could have thought they had probable cause in this case. Moreover, case law involving the enforcement of Section 871 confirms that Bryant's conduct could reasonably be thought to come within the statute's proscriptions.

[5] There is no dispute in this case that all of the facts and circumstances on which petitioners based the arrest either were within their knowledge or—in the case of the reports as to Bryant's conduct while delivering the letters—appropriately characterized as "reasonably trustworthy information."

In the most frequently quoted formulation (relied upon by the court of appeals, see App., *infra*, 10a), Section 871 is said to

> require only that the defendant intentionally make a statement * * * in a context or under such circumstances wherein a *reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression* of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress, or coercion.

Roy v. *United States*, 416 F.2d 874, 877-878 (9th Cir. 1969) (emphasis added); *United States* v. *Merrill*, 746 F.2d 458, 462 (9th Cir. 1984) (citing cases), cert. denied, 469 U.S. 1165 (1985); *United States* v. *Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) ("apparent determination to carry out the threat"), cert. denied, 467 U.S. 1228 (1984); *Ragansky* v. *United States*, 253 F. 643 (7th Cir. 1918) (same).[6]

In accord with this formulation, every circuit but one to consider the question has held that the statute "does not require that the defendant actually intend to carry out the threat." *Roy* v. *United States*, 416 F.2d at 878; *United States* v. *Callahan*, 702 F.2d 964 (11th Cir.), cert. denied, 464 U.S. 840 (1983); *United States* v. *Vincent*, 681 F.2d 462, 464 (6th Cir. 1982); *United States* v. *Smith*, 670 F.2d 921,

[6] Words uttered in jest or as political hyperbole do not violate Section 871. See *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam); *United States* v. *Frederickson*, 601 F.2d 1358, 1364 (8th Cir. 1979).

922-923 (10th Cir. 1982) (threat defined as "avowed present determination or intent to injure"; key word is "avowed"); *United States* v. *Kelner*, 534 F.2d 1020, 1025 n.6 (2d Cir.), cert. denied, 429 U.S. 1022 (1976); *United States* v. *Hart*, 457 F.2d 1087 (10th Cir.), cert. denied, 409 U.S. 861 (1972).[7] Those holdings follow directly from the dual purposes of Section 871: "to prevent assaults upon the President" and to avoid "the detrimental effect upon Presidential activity and movement that may result simply from a threat upon the President's life." *Roy*, 416 F.2d at 877. The mere existence of a threat can limit the President's freedom of action, even if the threat is later determined to be groundless.

Because an individual may be capable of making such a threat even if he suffers from severe mental disturbance, the fact that an individual is mentally disturbed does not preclude prosecution under the statute. In fact, such prosecutions are frequent, and the details of the threats that are prosecuted are often bizarre. *E.g.*, *United States* v. *Mitchell*, 812 F.2d 1250, 1252 (9th Cir. 1987) (defendant claimed he was Mahatma Gandhi and son of Nehru and had guerilla army in Philippines); *United States* v. *Crews*, 781 F.2d 826, 829 (10th Cir. 1986) (patient in hospital psychiatric ward). Indeed, a threat made by an individual who is mentally unstable may impair the President's ability to carry out his functions as much as a threat made by one who is sane. Moreover, our nation's sad experience with assassinations suggests that mentally unstable individuals may be

[7] Only the Fourth Circuit has taken a different view. See *United States* v. *Patillo*, 438 F.2d 13 (1971) (en banc) (statute requires "present intention to do injury to the President").

all too likely to act on their threats. See pp. 22-23, *infra*.

4. Both the facts surrounding Bryant's conduct and the nature of petitioners' investigation of that conduct establish that, although alternative explanations of Bryant's statements were no doubt possible, petitioners acted reasonably in determining that there was sufficient cause to believe he had violated the statute. Petitioners consequently were entitled to qualified immunity as a matter of law.

a. Bryant himself admitted to writing and delivering the letter, which not only discussed threats to the President's life but also indicated an awareness of the President's movements. App., *infra*, 46a, 52a. When petitioners interviewed Bryant, he "refused to state whether he intended to harm the President." *Id.* at 53a. Petitioner Hunter had been told by the individuals who received the letter that Bryant had moved his finger across his throat while delivering the letter and asked whether "he" had been assassinated yet; both the gesture and the use of "he" could be reasonably taken to refer to the President. *Id.* at 43a, 47a-48a. To be sure, Bryant asserted in the letter that someone else—"Mr. Image"—had threatened the President; had "Mr. Image" been a real person, perhaps the argument could have been made that petitioners should at least have investigated "Mr. Image" before determining that the threat in reality came from Bryant. But "Mr. Image" was not a real person, and petitioners reasonably concluded that "Mr. Image" was present only in Bryant's mind, as an aspect of his personality. *Id.* at 48a-54a. Thus, petitioners acted reasonably in concluding that they had probable cause to believe that Bryant, while attributing the threat to

a fictional person, had himself made a threat against the President.

b. The facts and circumstances surrounding petitioners' investigation—which were ignored by the court of appeals—further reinforce the reasonableness of petitioners' conclusion that Bryant could be seen to have threatened the President. First, Agent Hunter read the letter. App., *infra*, 42a. Then, he investigated the facts surrounding the delivery of the letter. *Id.* at 43a. Having found that both the letter and the conduct of the person who delivered it could be interpreted as threatening, Agent Hunter determined that further investigation was necessary. With the assistance of Agent Jordan, he proceeded to interview Bryant and to search his residence. After the interview, petitioners analyzed their information in light of "the factual and practical considerations of everyday life on which reasonable and prudent men * * * act" (*Brinegar*, 338 U.S. at 175), and concluded that there was sufficient cause to believe that Bryant had threatened the President in violation of the statute. The deliberate, careful sequence of response, investigation, interview, and decision buttresses the conclusion that petitioners acted within the bounds of reason in making their probable cause determination. As Judge Trott stated, "not a scintilla of evidence exists that either agent was acting in bad faith." App., *infra*, 33a.

5. Although the general discussion in the court of appeals' opinion alluded to correct formulations of the legal standard governing qualified immunity, the standard that the court actually, and explicitly, applied was dramatically different. The following passage is the operative portion of the court's opinion:

> [T]he letter read in its entirety does not appear to make a threat against the president. Most of the letter does not even talk about President Reagan. *A more reasonable interpretation of the letter might be* that Bryant was trying to convince people of the danger Mr. Image and the conspiracy posed rather than that Bryant was speaking through Mr. Image. The fact that Mr. Image appears to be someone of whom Mr. Bryant disapproves appears to cut against the alter ego theory. Rather, Mr. Image is part of the evil forces that are keeping black men, including Bryant oppressed.
>
> Additionally, there was absolutely nothing in the surrounding circumstances to suggest a different reading of the letter. Rather, a man making vague and disjointed statements and odd gestures was wandering around the USC campus handing out a weird letter (or tract) addressed to no one in particular, which he wanted delivered to university officials.

App., *infra*, 11a (emphasis added).

In this passage, the court first posited its alternative interpretation of Bryant's letter—that the letter was attempting to warn the President of a conspiracy by an entirely fictional "Mr. Image." The court then analyzed the evidence to determine whether it "cut against" petitioners' interpretation and in favor of the court's alternative. Finally, the court advanced an alternative explanation of "the surrounding circumstances" under which Bryant's conduct included only "vague and disjointed statements" and the delivery of a "weird letter." Nowhere in this passage or elsewhere did the court consider whether *petitioners'* interpretation of events was one that could be

adopted by a reasonable person; instead, the court confined its analysis to the question whether its alternative explanation of the letter and surrounding circumstances was preferable to that on which petitioners had acted.

Although the court may have been correct that its reading of the letter and the surrounding circumstances—in hindsight and with the luxury of time to consider the situation—was itself reasonable, that fact is entirely irrelevant to the analysis that the court should have conducted. Under settled legal doctrine, a court may not deny qualified immunity on the ground that an appellate court or finder of fact—operating in hindsight and with full benefit of briefing, argument, and ample time for consideration—could reasonably arrive at a different interpretation of events from the one on which petitioners acted. The *only* proper question was whether petitioners themselves acted outside the bounds of reason or competence in assessing the facts. And that question was neither asked nor answered in the opinion of the court of appeals.

6. Despite the Ninth Circuit's plain departure from settled legal principles governing qualified immunity determinations, we have some doubt that plenary review of this case is warranted. Although, as discussed above, the standard applied in the Ninth Circuit's opinion is manifestly incorrect, some of the general discussion in the court's opinion did correctly set forth the law governing qualified immunity. In addition, the court did not purport to rely on any decision of any other court in articulating or applying its incorrect standard, nor are we aware of any decision supporting the court's analysis.

We do believe, however, that summary reversal of the judgment is warranted.[8] This Court has frequently remarked that a "*Bivens* remedy, in addition to compensating victims, serves a deterrent purpose." *Carlson* v. *Green*, 446 U.S. 14, 21 & n.7 (1980). See *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983); *Harlow*, 457 U.S. at 819 ("Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate."); *Mitchell* v. *Forsyth*, 472 U.S. at 524 (referring to purpose of providing officials with "incentives to abide by clearly established law").[9] Because of that deterrent effect, the Ninth Circuit's decision, if permitted to stand, could have an adverse impact on the enforcement of 18 U.S.C. 871. In light of the crucial role played by Section 871 in assisting the Secret Service to protect the President (as well as the others in the line of succession), correction of the court of appeals' error is essential.

a. Section 871 has long been recognized as a vital tool for the Secret Service to use in carrying out its statutory protective responsibilities.[10] As a former

[8] Cf. *Freeport-McMoRan Inc.* v. *K N Energy, Inc.*, 111 S. Ct. 858 (1991).

[9] See also *Robertson* v. *Wegmann*, 436 U.S. 584, 590-591 (1978) (Section 1983 action); *Carey* v. *Piphus*, 435 U.S. 247, 256 (1978) (same).

[10] In amending 18 U.S.C. 871 and adding a companion statute, 18 U.S.C. 879, in 1982, Congress recognized that the threat statutes provide the Secret Service with an important means to carry out its protective function. See H.R. Rep. No. 725, 97th Cong., 2d Sess. 3; *id.* at 12 (enacting 18 U.S.C. 879 to extend 18 U.S.C. 871 threat statute to new protectees "would beneficially affect their security"). See also H.R. Rep. No. 578, 84th Cong., 1st Sess. 2 (May 10, 1955) ("It has been the experience of the Secret Service that [18 U.S.C. 871] has been a great aid in the investigation of threats against the President, in that it permits prompt Federal action to be taken in the matter regardless of the manner in which the threats are communicated.").

Assistant Secretary of the Treasury for Enforcement has testified, Section 871 "provides a clear avenue for responding to [a] threat as a Federal criminal offense for which arrest and possibly prosecution are available." *Prohibition of Threats Against the Presidential Candidates and Other Persons Not Covered by the Presidential Threat Statute: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 6 (1982). When an individual has threatened the President, Section 871 provides Secret Service agents investigating the threat with the authority to arrest the individual involved, rather than requiring them to wait to determine whether the threat will be carried out. In these instances, then, the President need not be faced with the alternative of either exposing himself to individuals who may do him harm or curtailing his activities to avoid any possible exposure.

b. Although security concerns preclude the Secret Service from releasing detailed information on its protective function, the Service's policy is that "[t]hreats against any individual being protected by the Secret Service receive a thorough and timely response by that agency and are a matter of the highest priority until the threat is neutralized." 1982 Hearing at 5-6. (In this case, for example, the report of Bryant's threat received a thorough investigation on the very day it was reported.) Although the number of threats is quite high,[11] each of those threats must be individ-

[11] During 1989, the 1,916 Secret Service agents—many of them assigned to tasks other than protective intelligence, see

ually investigated and an on-the-spot determination made as to whether an arrest is necessary.

Many of the threats investigated by the Secret Service come from mentally unbalanced individuals. Of the 41 Presidents of the United States, ten have been the subject of attempted or actual assassinations.[12] A Presidential Commission concluded in a 1969 study of presidential assassinations that "no presidential assassination, with the exception of an abortive attempt on the life of President Truman, has been demonstrated to have sprung from a decision of an organized group whose goal was to change the policy or the structure of the United States government." National Comm'n on the Causes and Prevention of Violence, *To Establish Justice, To Insure Domestic Tranquility* 122 (1969). Instead, "[d]eranged, self-appointed saviors have been the murderers of American Presidents" and have produced "many of the assassinations of other national leaders

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18 U.S.C. 3056(b)—opened 7,894 protective research cases, most of which involved threats to protected officials. *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1991: Hearings Before Subcomm. on the Treasury, Postal Service, and General Government Appropriations of the House Comm. on Appropriations*, 101st Cong., 2d Sess. 588 (1990). In testimony before Congress in 1983, a Secret Service official estimated that the Service receives 20 to 25 calls per day concerning potential threats. *The United States Secret Service and Its Use of the National Crime Information Center: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 26 (1983).

[12] Presidents Jackson, Theodore Roosevelt, Franklin Roosevelt, Truman, Ford, and Reagan were the targets of assassination attempts. Presidents Lincoln, Garfield, McKinley, and Kennedy were assassinated while in office.

and public officials." *Id.* at 125. Events since 1969 have confirmed those conclusions; the 1975 attempts on the life of President Ford by Sarah Jean Moore and Lynette Fromme, as well as John Hinckley's attempted assassination of President Reagan, were the works of mentally unstable individuals, not organized groups attempting to further a political objective.

8. In this unique context, the concerns that "fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties" (*Anderson* v. *Creighton*, 483 U.S. at 638),[13] take on particular significance. Agents must (and do) perform their protective function with due regard for the constitutional rights of our citizens. But they cannot adequately enforce Section 871 and protect the President if they face the threat of years of litigation and a very substantial damage judgment for taking enforcement actions that they reasonably believed to be—and that in fact were—fully legal at the time.[14] Moreover, the deterrent effect of a *Bivens* action is a general one; the effects of the court of appeals' decision can be expected to be taken into

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[13] See also *Davis* v. *Scherer*, 468 U.S. at 196 ("officials should not err always on the side of caution"); *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974) (recognizing "the danger that the threat of * * * liability would deter [an officer's] willingness to execute his office with the decisiveness and the judgment required by the public good").

[14] Petitioners in this case, for example, have been defendants in this lawsuit for 5 years, subject to the uncertainties of litigation and the potential risk of a substantial damages judgment at its ultimate termination. The amended complaint sought general damages of $1,000,000 and punitive damages of $5,000,000 against each of petitioners.

account by all Secret Service agents assigned to protective intelligence cases. And the cost of failing to enforce Section 871 is not merely that a criminal may escape punishment; in Judge Trott's words, "[w]e expect the Secret Service to prevent these crimes, not just attend funerals when they occur." [15] App., *infra*, 30a.

9. Finally, the fact that the court of appeals' judgment is interlocutory does not counsel against summary disposition. A public official's qualified immunity is "an *immunity from suit* rather than a mere defense to liability." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). This Court's immunity cases have thus emphasized that the qualified immunity issue "should be resolved at the earliest possible stage of a litigation." *Anderson*, 483 U.S. at 646 n.6. Accord *Malley*, 475 U.S. at 341; *Cleavinger* v. *Saxner*, 474 U.S. 193, 208 (1985); *Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 818. Accordingly, this case should not be allowed to return to the district court for further litigation and, perhaps, a trial. That course would needlessly prolong the uncertainty facing petitioners and would permit the court of appeals' erroneous decision to continue to chill enforcement of Section 871. Because the court of appeals' error threatens a unique federal interest, it warrants correction now by this Court.

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[15] See generally *Review of Secret Service Protective Measures: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 94th Cong., 1st Sess. (1975) (hearings concerning Secret Service procedures for investigating threats, focusing on the Service's interview of Sara Jean Moore the day before she attempted to assassinate President Ford).

CONCLUSION

The petition for a writ of certiorari should be granted and the Court should summarily reverse on the ground that undisputed facts establish that petitioners were entitled to qualified immunity. Alternatively, the court should reverse and remand to the court of appeals, with instructions to apply the appropriate legal standard to petitioners' qualified immunity claim.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

JEANNE S. ARCHIBALD
General Counsel

DENNIS I. FOREMAN
Deputy General Counsel
Department of the Treasury

JOHN J. KELLEHER
Chief Counsel
United States Secret Service

MARCH 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 88-5889

JAMES V. BRYANT, JR., PLAINTIFF-APPELLEE

v.

UNITED STATES TREASURY DEPARTMENT,
SECRET SERVICE, DEFENDANT

and

JEFF JORDAN; BRIAN V. HUNTER,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California

Argued and Submitted March 10, 1989
Decided May 18, 1990

Before: SCHROEDER, FLETCHER and TROTT, Circuit Judges.

FLETCHER, Circuit Judge:

Plaintiff-appellee James V. Bryant brought a *Bivens* action after his arrest by two agents of the United States Secret Service. The agents, Jeff Jordan and Brian V. Hunter ("defendants"), bring an interlocutory appeal from the district court's denial in part of their summary judgment motion seeking dismissal based on qualified immunity.[1] Bryant does not cross-appeal other decisions of the district court granting partial summary judgment to these defendants and dismissing other defendants.

FACTS

On May 3, 1985, a sergeant from the University of Southern California (USC) campus security telephoned defendant Hunter. The sergeant told Hunter that Bryant had, earlier that day, delivered two photocopies of a handwritten letter to two USC administrative offices.[2] The sergeant told Hunter that the letter contained references to a plot to murder President Reagan.

The letter describes a large-scale conspiracy by "Communist white men within the National Council of Churches," whom Bryant refers to collectively as "Mr. Image." In a rambling discourse the letter describes in general terms and with tangential references a conspiracy directed against black males; it condemns Mr. Image, who is viewed as a destructive influence on black males. (Bryant is black.) The letter ends by warning that Mr. Image intended to as-

[1] Jurisdiction in the district court was based on 28 U.S.C. § 1331. Defendants appeal under 28 U.S.C. § 1291; *see also Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

[2] A copy of the letter is included as an Appendix to this opinion.

sassinate Mr. Reagan during his upcoming tour of Germany. (Mr. Image hoped to install then Vice-President Bush in the White House.)

Hunter read the letter and interviewed the two USC employees who had received the photocopies. One employee told Hunter that a black man gave her the letter on May 3, 1985, and told her to give it to the director of the USC Budget Office. She said the man made statements about "bloody coups" and "assassination," and also said something about "across the throat" while simultaneously moving his hand horizontally across his throat. A second employee told Hunter that she had been given a photocopy of the letter by a man who told her to forward it to the President of USC. She told Hunter that the man told her "he should have been assassinated in Bonn." She also told Hunter that the man identified himself as James V. Bryant on a piece of paper he left with her.

Hunter determined that the matter warranted further investigation. Secret Service agent Jordan was assigned to asisst Hunter. That evening, May 3, 1985, Hunter and Jordan went to a Los Angeles address provided on the letter. They knocked on the door and announced themselves as law enforcement officers. Bryant answered the door. The agents asked if they could enter the residence to speak with Bryant. Bryant gave the agents permission to enter.

Hunter told Bryant that the agents had come because of the photocopied letters. Bryant admitting writing the letter and leaving the photocopies at USC. Hunter asked Bryant to identify "Mr. Image," but Bryant responded in a manner Hunter characterized as "rambling and confused," and, according to Hunter "refus[ed]" to identify Mr. Image. Jordan's declaration is consistent with Hunter's, but neither agent in his declaration quotes Bryant directly.

Hunter asked Bryant for permission to search the residence. Bryant gave permission. Hunter found the original letter but no other evidence. Jordan continued to talk to Bryant, who, according to Jordan, refused to answer questions concerning his attitudes and feelings about the President and refused to state whether he intended to harm the President.

The agents decided to read Bryant his *Miranda* rights. Bryant waived his right to remain silent. The agents again asked him about the identity of Mr. Image. According to Jordan, "Bryant responded in a rambling and confused fashion, such that I could not discern the identity of Mr. Image or whether there was actually a person known as Mr. Image." The agents then told Bryant he was under arrest for threatening to take the life of the President, in violation of 18 U.S.C. § 871.

Bryant was arraigned on May 6, 1985, and ordered held without bail pending a detention hearing. He was held for approximately fourteen days, until the criminal complaint was dismissed on motion by the government on May 17, 1985.

Bryant initiated his suit in May 1986, and filed an amended complaint on January 27, 1987, alleging causes of action under the Federal Tort Claims Act (FTCA) and a *Bivens* theory. On the government's motion, the district court dismissed the FTCA causes of action for lack of jurisdiction and dismissed in its entirety the action against the Secret Service, its director and the Doe defendants. The only remaining defendants were Hunter and Jordan. They moved for summary judgment on the ground of qualified immunity. The district court granted the motion as to some of Bryant's claims, but ruled that defendants were not entitled to qualified immunity on Bryant's

Fourth Amendment claims for arrest without probable cause and without a warrant. The court denied the motion for summary judgment because it decided further fact-finding was necessary. Defendants appeal from that denial.

DISCUSSION

We review a defendant's motion for summary judgment, seeking dismissal on the basis of qualified immunity, *de novo* applying the same standard as did the trial court. *Baker v. Racansky*, 887 F.2d 183, 185 (9th Cir.1989). The question before the district court was whether a secret service officer, in light of clearly established law at the time of Bryant's arrest on May 3, 1985, reasonably could have believed that the information possessed by the arresting agents constituted probable cause to support an arrest under 18 U.S.C. § 871 for threatening the life of the President. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The district court denied the defendants' motion for summary judgment holding that there were genuine issues of material fact. Because the relevant legal rule was clearly established at the time of Bryant's arrest, and the district court properly concluded more factfinding was necessary to determine whether a reasonable secret service agent could have believed that the information he possessed constituted probable cause for that arrest, we affirm the denial of summary judgment.[3]

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[3] It is not clear from either the district court order of partial summary judgment or the transcript of the proceedings whether the district court found that the further factual

Ordinarily a denial of summary judgment is not appealable because it is purely interlocutory. However, the Court held in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) that qualified immunity should operate to protect government officials from needlessly defending against suits as well as from liability, and that to prohibit appeals from a denial of qualified immunity until after trial would mean that the immunity effectively would be lost. Appellate review of denial of summary judgment under *Mitchell* is narrow and purely legal. This case requires us to decide two issues: first, were the rights clearly established, and if so, is there any genuine issue of material fact as to whether a reasonable officer could believe they were violated.

Qualified immunity is an affirmative defense for which the government official bears the burden of

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development was necessary to determine whether the secret service officers had probable cause to arrest Bryant—an improper inquiry in response to an assertion of qualified immunity—or to determine if the officers reasonably could have believed they had probable cause which is the proper standard for evaluating qualified immunity. The order concludes with the following:

> Plaintiff's Fourth Amendment claims based on arrest without probable cause and a warrant, however, cannot be dismissed. A genuine factual dispute still exists concerning whether the defendants had probable cause to arrest plaintiff—whether, at the moment of arrest, the facts and circumstances within the knowledge of the arresting officers and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that Bryant had violated 18 U.S.C. Section 871(a).

Because we find that the Secret Service failed to meet their burden of proof as to even the more lenient standard, we affirm the denial of summary judgment.

proof. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982), *Benigni v. City of Hemet*, 853 F.2d 1519, 1525 (9th Cir.1988). As with all summary judgment motions, the evidence should be viewed in the light most favorable to Bryant as the nonmoving party; to prevail on their motion for summary judgment, the defendants must show that they were reasonable in their belief that they had probable cause. Bryant, however, bears the burden of proving that the right which the defendants allegedly violated was clearly established at the time of their conduct. *Baker*, 887 F.2d at 185, 186.

I.

Federal law enforcement officials cannot be held liable for damages under a *Bivens* theory unless their conduct violates a clearly established constitutional right. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). As the Supreme Court instructed in *Anderson v. Creighton*, 107 S.Ct. at 3044, the operation of the "clearly established law" standard very much depends upon the level of abstraction at which the relevant legal rule is articulated. The right allegedly violated must not be defined at the level of generality as, for instance, the right to due process of law, for this would "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability." The right the official is alleged to have violated must have been clearly established "in a more particularized, and hence more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 3039.

18 U.S.C. § 871(a), the statute under which Bryant was arrested, provides:

> Whoever knowingly and willfully deposits for conveyance in the mail . . . any letter . . . containing any threat to take the life of, . . . or to inflict bodily harm upon the President of the United States, . . . or knowingly and willfully otherwise makes any such threat against the President . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The statute has been construed to require consideration of both the text or the words themselves as well as the context in which they were delivered. *Roy v. United States*, 416 F.2d 874 (9th Cir.1969); *United States v. Moncrief*, 462 F.2d 762 (9th Cir. 1972). In order for a secret service agent reasonably to have believed he had cause to arrest Bryant, the agent must have been reasonable in his belief that Bryant's words and the context in which he delivered them were a serious threat against the president. *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).

The dissent suggests that this is a vague standard that cannot constitute "clearly established law." It suggests that further case law would be necessary to flesh out what constitutes "probable cause" for violation of the statute before the standard could be regarded as "clearly established." We disagree. This standard is capable of understanding and practical application by law enforcement officers. A statute requiring a knowing or willful threat, interpreted for 20 years to mean "a serious expression of an intention to inflict bodily harm upon or to take the life of the President," *Roy*, 416 F.2d at 877, is not a vague standard like "due process."

II.

Whether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment or a directed verdict in a § 1983 action based on lack of probable cause is proper only if there is only one reasonable conclusion a jury would reach. *Kennedy v. L.A. Police Department*, 887 F.2d 920, 924 (9th Cir.1989), *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir.1984). Because qualified immunity protects government officials from suit as well as from liability, it is essential that qualified immunity claims be resolved at the earliest possible stage of litigation. *Mitchell* 472 U.S. at 526, 105 S.Ct. at 2815. This necessarily expands the fact-finding role that must be played by the district court judge. In some cases, district courts will be able to establish entitlement to qualified immunity before trial and, sometimes, even before discovery. *See, e.g., Ortiz v. Van Auken*, 887 F.2d 1366 (9th Cir. 1989) (reversing district court's denial of summary judgment based on claim of qualified immunity, finding that officer who obtained search warrant from judge was entitled to qualified immunity in civil rights action); *Baker v. Racansky*, 887 F.2d 183 (9th Cir.1989) (reversing district court's denial of summary judgment on the basis of qualified immunity, finding that alleged conduct did not violate clearly established law), *Merriman v. Walton*, 856 F.2d 1333 (9th Cir.1988) (affirming district court's denial of defendant's motion for summary judgment on qualified immunity grounds, finding a reasonable police officer would have made further inquiry before making the warrantless arrest). In some cases, however, further development of the record will be necessary. In this case it was proper for the court to re-

quire further development of the facts to determine whether the secret service reasonably could have interpreted the letter as violating § 871.

Both the qualified immunity doctrine and § 871 invoke an objective standard. As the court stated in *Anderson*, 107 S.Ct. at 3140, the question to be answered under the qualified immunity doctrine is not whether the officer subjectively acted in good faith, but whether a reasonable officer could have believed he had probable cause to search a residence or to arrest. Likewise, violation of 18 U.S.C. § 871 turns not on whether the individual actually intended to harm the president, but whether a reasonable person would interpret the words used as a threat. This court has construed the willfulness requirement of the statute as requiring "only that the defendant intentionally make a statement . . . in a context or under such circumstances wherein *a reasonable person* would foresee that the statement *would be interpreted by those to whom the maker communicates the statement* as a serious expression of an intention to inflict bodily harm upon . . . the President. . . ." *Roy*, 416 F.2d at 877 (emphasis added.)

Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Viewing the letter in the context in which it was delivered and evaluating it in light of these objective standards, the defendants failed to meet their burden of proving that a reasonable Secret Service officer could interpret this letter and the attendant circumstances to constitute a serious threat.

Hunter and Jordan's allegations that they had a reasonable belief that probable cause existed to arrest Bryant for threatening the life of the President was based on Bryant's admission that he wrote and delivered a letter which contained references to assassination attempts directed at Reagan, that Reagan occasionally visited the Los Angeles area, and that, based on their training and experience as Secret Service agents, they believed "Mr. Image" could be a pseudonym for Bryant.

Even accepting the "alter ego" theory that by warning what Mr. Image was going to do, Mr. Bryant was in fact communicating what he himself planned to do, the letter read in its entirety does not appear to make a threat against the president. Most of the letter does not even talk about President Reagan. A more reasonable interpretation of the letter might be that Bryant was trying to convince people of the danger Mr. Image and the conspiracy posed rather than that Bryant was speaking through Mr. Image. The fact that Mr. Image appears to be someone of whom Mr. Bryant disapproves appears to cut against the alter ego theory. Rather, Mr. Image is part of the evil forces that are keeping black men, including Bryant oppressed.

Additionally, there was absolutely nothing in the surrounding circumstances to suggest a different reading of the letter. Rather, a man making vague and disjointed statements and odd gestures was wandering around the USC campus handing out a weird letter (or tract) addressed to no one in particular, which he wanted delivered to university officials. The defendants simply have not sustained the burden of proving their affirmative defense.

It appears from the record that no discovery has taken place. Further development of the record pre-

trial or during trial may establish information that the secret service agents possessed that made them believe that Bryant's letter should be interpreted as a serious threat against the president. If further development of the record occurs prior to trial, it is possible that renewal of defendants' motion for summary judgment at a later date might be appropriate. Our remand for further proceedings does not foreclose the defendants presenting additional information that might establish that a reasonable officer could interpret the letter and the surrounding circumstances to constitute probable cause for arresting Bryant for violating § 871. Information, for instance, about what knowledge Secret Service officers possess as a result of their professional training about communications by thought disordered persons as well as any information they may have possessed about Bryant may be necessary in order to resolve the "objective (albeit fact-specific) question whether a reasonable officer could have believed [Bryant's arrest] to be lawful in light of clearly established law and the information the searching officers possessed." *Anderson*, 107 S.C.t at 3040. As the Court instructed in *Anderson*, ". . . the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials." *Id.* at 3040.

We are mindful that the purpose of qualified immunity is to prevent the disruption of effective government that can result from forcing officials to respond to broad discovery and to go to trial. As courts have noted, however, this risk is of most concern where the subjective intent of the officials is at issue. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct.

2727, 73 L.Ed.2d 396 (1982) (restricting the "subjective aspect" of the qualified immunity defense because of the substantial costs that attend the litigation of the subjective good faith of the government official). Where the only question presented to the factfinder is the reasonable interpretation of a letter and the knowledge the Secret Service officers possessed, that risk is considerably and significantly less. The court in *Anderson* left open the possibility for district court judges initially to limit the scope of discovery to facts upon which the immunity determination turns.

In affirming the district court's denial of summary judgment at this point in the proceedings we emphasize that the proper inquiry is *not* whether there was probable cause, but rather whether the secret service agents reasonably could have believed that there was. Qualified immunity doctrine embraces the possibility that government officers will make errors of judgment that are not unreasonable. Further, the inquiry is not whether it was reasonable to believe that Bryant would actually harm the president, but whether it was reasonable to believe that he had issued a threat to harm him.[4] Therefore, the proper factual inquiry is not whether the agents reasonably believed Bryant intended to kill or actually could have assassinated Reagan, but solely whether the agents reasonably believed he had issued a threat.

III.

In light of the possibility that at some point in the proceedings it may be determined that the officers

[4] In addition to preventing assaults upon the president, another purpose of 18 U.S.C. § 871 was to prevent the "detrimental effect upon presidential activity and movement that may result simply from a threat." *Roy*, 416 F.2d at 877.

reasonably believed they had probable cause to arrest, we address a second issue this case presents: whether the law was clearly established as of May 3, 1985, that a warrantless arrest inside an arrestee's residence violated the warrant requirement of the Fourth Amendment, where the arrestee had consented to the agents' entry into the residence.[5] We conclude that the law was not clearly established. In fact the relevent case law strongly suggested that the officers could have believed that their warrantless arrest was lawful so long as they had probable cause and consent to enter the residence. In *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), the Supreme Court held that "the Fourth Amendment . . . prohibits the police from making a warrantless *and nonconsensual* entry into a suspect's home in order to make a routine felony arrest." *Id.* at 576, 100 S.Ct. at 1375 (emphasis added). Similarly, this court stated in dicta in *United States v. Gray*, 626 F.2d 102 (9th Cir.1980), "The existence of probable cause to arrest, however, does not justify entering a suspect's home without *either consent* or a warrant." *Id.* at 105 (emphasis added). Decisions from other circuits available in early 1985 indicate a trend in favor of upholding warrantless arrests following consensual entries. *See, e.g., Augustine v. Doe*, 740 F.2d 322, 325 (5th Cir.1984) (consent to entry is assumed to be sufficient to permit warrantless arrest) (dicta); *United States v. Briley*, 726 F.2d 1301, 1303 (8th Cir.1984) ("valid and voluntary consent may be fol-

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[5] Although the district court phrased its order in terms of lack of probable cause *and* lack of warrant, its analysis was limited to whether a reasonable agent could have believed he had probable cause to arrest Bryant. The issue of arrest within a residence without a warrant was not reached.

lowed by a warrantless in-home arrest"); *United States v. White*, 660 F.2d 1178, 1182-83 (7th Cir. 1981) (consent, even if obtained by deceit, can justify a subsequent warrantless arrest, at least where entry is not obtained solely for the purpose of arresting suspect). Given the state of authority in 1985, appellants are correct that the law did not clearly establish that the agents needed a warrant to arrest Bryant after he consented to entry into his home, so long as probable cause existed. Since there is no factual dispute over Bryant's consent to entry, appellants are entitled to qualified immunity on this issue.

CONCLUSION

The decision of the district court denying defendants' motion for summary judgment on qualified immunity grounds on the state of the record at this time is AFFIRMED.

APPENDIX:

BRYANT'S LETTER

Jim V. Bryant
563-0485
(sis Mollins)

[illegible]

Childrens Lives

The "National Council of Negro Women" the "Eastern Star" in the Black churches and Mr. "Image" (Communist white men within the "National Council of Churchs) [The name "Image to the Beast" is a biblical name given to and identifys the National Council of Churches as a body] though the NCC is composed largely of women, it is men who really control it. So it is appropriate to respectfully address the NCC as Mr IMAGE!

So Mr Image and the two above mention organizations are playing Politics with our childrens lives, you would think these organizational cesspools of filth and corruption would find contentment in the millions of lives they are responsible for already destroying Via spreading of Communism, organized Crime, ETC. Now they are at it again, sex naturaly would be involved.

They want to move the So. L.A. Community boundry line from Alameda ST. further east so that white Students in South Gate, Calif. may be bussed to Jordon High, a mostly Black school in Compton Calif. and West of Alameda Blvd. the reason they desire this, is so that white male students may become romaticaly involved with black girls, the idea so far is fine, most black men who understand would welcome such a move if they to were allowed equal access to white girls.

But two hundred years has proven one thing, White male bigots and the black bigoted femal are jealous of such a union between the blackmale and white-femal. In order to keep this extreemly crule conspiracy alive they conspired to put as many black young men in jail as posiable, and in this particular case that is just what they did. In So. Central L.A. they kept the black young school boy unemployed, knowing that such a hopless state would drive him eventually to brake the law by stealing ETC. and with him out of school and in Jail Jordon High would be ripe for the picking. The Black-femal in the organizations aleady mentioned are extreemly jealous of white women, by lie's and deception they have scared many white women from considering the idea of getting a black male mate. and the White male bigot used every unholy, illegal means to keep the white woman inslaved and away from black men. One of civilized men's greatest test in life, is human relations, inlighten men and women (white & black) must wonder how did these organizations miss the boat with such good examples as Central America, So. America and Mexico to show them the way. I suspose there is no honor among thives will in this case among Mass murders, thats no doubt why they never got together in a respectable marriage relationship, she became a garbage can for his garbage until she became burned out, then he would send her back into the black community to marry some unsuspecting black man.

P.S. Our next white up will concern itself primarily with, NAMES, Addresses, and Owners of Black businesses in South Central L.A. and West L.A. who are presently involved in organized Crime.

[circled:] Good people must now take stand or violence and anarcy will rule the streets (Back NICE and we can have a free State)

The Jealous Syndrome has not only an Image concern, it is a concern for a large number of Black men also. Now Mr Image is a bad boy, i think we can all agree on that, and a large number of Black women are no angels. But the Black-male Bourgeois is another breed.

Using Mr. Image as a criterion, we will attempt to measure the person and character of the Black-male Bourgeois. In a few words Mr Image can be truthfully described as wicked, cunning, Devilish, but he is not what you would normally consider stuped, but rather he would be considered highly intelligent in a Satonic kind of way, he is very crule and evil needless to say. In contrast, the Black-Male Bourgeois does not have the mental powers of Mr. Image and no where near his cunning interlect, the average Black-Male B. is a child in the face of Mr Image, he 'nows they are cowards so he plays along with their childish blackmailing while at the same time disarming them; In other words the Black-Male B. are mentaly slow and are true cowards, An example of how their blackmailing adventures are carried on. Upon learning of the Blackmailing being ingaged in by the Blackmale B. against the three organizations mentioned earlier, this writter dicussed with Blackmale B. the disadvantage of Blackmailing. I informed them that they need not blackmail Mr Image to get money, i explained to them how Mr Image owed me Two Billion, Eight Hundred fifty million dollars, and that i would be more then happy to share it with them in a joint effort to help the hard core unemployed in Calif.

And since this writter has already instructed Mr Image that Calif. would remain free until the U.S. Congress passes a national Sunday Law, (which is near the end of the world) So then jobs for Calif. Citizens is a must, and it was this writters hopes that Blackmale B. would embrace a simular view also, but Mr. Image wispered a few dollar Bills into their ears and their commitment to care for the needy was all but forgotton

[circled:]

Mr Image you are still running from me coward, coward, coward, coward, coward, coward.

[circled:]

Mr Image and Blackmale B. will be held responsible for any hurt done to any home or said residents within the L.A. Calif. area thast has been sprayed by NICE Pest exterminators.

James Bryant

What this writter is saying is, a mind as slow as the Black-Male B., is not the kind of mind that heaven would have using this power found in the "Image to the Beast" prophecy.

Dear friends the God of Abraham, Isaac and Jacob commissioned me to use and be the visable protector of this power until His church relieves me of the responsiability by doing the job this writter is now doing, exposing the Image so that people may know and see.

So my dear Brothers quietly stept aside and let LOVE have it's day.

For you see, Jesus Christ has decreeded it, and tell me who would be so unwise as to go against His will?

You see my brothers (Black-male B.), the only way heaven would allow you to use this power without penalties is that, you must first come to love everyone, regardless of race, color, relegion, creed or even how the person looks.

You see God is beautyfull ps.27:4 & Isa. 33:17, you cant hate Beauty and claim to love the God of Beauty.

[circled:]

it is this writers belief that the Creator of the Universe would have this writter (James V. Bryant) to have a voice pronto in California!!!!!!

[circled:]

"Open rebuke is Better than Secret Love." Pro. 27:5

You must be born again and receive the love of God in your heart, because in your present spiritual state of Jealousy (murder), this power found in the three angeles love message of Rev. 14:9-12 did not dwell in your heart, and without love you dont have REAL power, only a Counterfit power which could lour you into a falsh security, wake up before it is to late!'!!!!!

—Now for a bit of news you the reader might find interesting. Mr Image wants to murder President Reagan on his up and coming trip to Germany. WHY?

Will it goes somthing like this,

Now Vice President George Bush, was chief CIA Director back in 1978 and played a key role in the Guyana Massacre, for his faithfullness in carrying out his role in the guyana massacre conspiracy which resulted in over 918 American citizens being mur-

dered, George Bush was promised the presidency of the United States of America, and Mr. Bush's experty in the field of law

[circled:]

be encouraged friends, i'm not perfect but i trust in God and he protects me from Mr Image & Satan.

[circled:]

"The wicked flee when no man pursueth: But the righteous are bold as a LiON." Pro. 28:1

enforcement most certainly would add new demenions to the power of the presidency; the cospiritors desiring to put Bush in the white house were and still are desirous of his maximum presidential powers to be employed and used to silence all matters concerning the Guyana Massacre. And Mr. Bush Agreed, that if he was established as President of the U.S., he would do all he could to silence all matters surrounding the Guyana Massacre. But there was just one thing needed tending to, Ronald Reagan had been elected just as planned by the conspiritors, now they needed to remove him so that they (Mr. Image & comrades) could install George Bush in the White House. But the now President Reagan has survived two of Mr Image's assassination attempts, you the reader no doubt remember the most recent attempt on the Presidents life involving a crazed young man by the name of Hinkley who shot the president as he was intering his limosine, but the sassination attempt that has the makings of a Hollywood Box-office best seller

[circled:] [illegible . . .]

Mr Image

with yours truely, Ronald Reagan as leading man, it surely would have been a big hit had it come off. U.S. news media called it, "the Lybian Hit Squad"

Mr Image had conspired with a large number of U.S. officials in the plot to murder President Reagan, Mr Haig and Mr Allen of the Security council along with Israil's Mr Begin, who was visiting Washington D.C. on the Middle East question in December of 1981. According to a phenix, Reporter; Mis Wind Black,

Explosives and equipment were obtained in Phenix, Arazona and in San Diego, Calif. by an American international businessman and shiped across the Country by a Palistenian Activest, his car was ticketed less than two blocks from the White House the day before the scheduled meeting.

The Lybian Hit Squad assassination attempt was never carried out due to this writter exposing the Plot back in 1981

[circled:]

Mr Image would rather take on the nation of Japan in a trade war then to tackle with me. he is a coward

the American businessman and the Pelastinian were arrested and both pleaded guilty to charges relating to explosives. Now Mr. Image wants to try his hand again at attempting to remove President Reagan from the White House Via asassination, while on tour in Germany in May, 1985. Will Mr Image, i guess we stoped you again, Regon you owe me ONE! (sm,ll) better yet Mr President, tell you what, Just write it up to Love's account and count it a joy! Remember the poor, thats how it's done my friends, all you have to do to stop Mr Image is find out what he is goijng to do before he does it, and put it in print

along with the Image phophecy as i have done and Mr Images hands are tied. Breefly i just want to caution my Japiness friends not to use the Image Prophecy for Blackmail, Jesus Christ loves you. take my advice, this is much, much bigger then you could ever dream. *DONT Blackmail*!!

[circled:]

One person on Gods side is a *MAjority!*

Mr Image's traffic Controled Courts are presently conspiring to steal my Cad car with the justification they have a right to because i have a ticket, personely I do not feel Mr Image or his Black comrads would get very far with Jesus Christ as my keeper.

so i would encourage them for their own good to leave Sis Smith and Sis Mullins of Ph 563-0485 along they sold me my present car—Mr Image, and leave my car along.

The Blackmale Bourgeois are conspiring to use recently released young men from the L.A. County Jail as hit men and terrorist in Black Communities mostly against Black women, with Mr Images approval naturally.

Mr Image would rather have anarcy and violence in control; to Mr Image, all the good men and women of the State of California we Say, No Anarcy and Violence in Our State.

More on the Guyana M.

[circled material, omiited from photocopy]

The people who just got you out of Jail by using the "Image" Prophecy, did so not because they loved you or carred about you; these blackmale Bourgeois (Communist) leaders got you out of jail in order to use you in gang violence against the very people who

want to get you jobs, you see young men, these black Communist do not want you to work, because Mr Image whom they are blackmailing does not want you to work, this compromise agreement was reached for Black-men Bourgeois and the Communist (Mr Image) in government But this writter James V. Bryant will continue to fight for jobs for the young men in South Central L.A.

P.S. Dont Follow the Black male Communist! or its all over.

[circled:] this writter spent (6) years in prison = Robbery I know!

President Ronald Reagan.

Mr Image (NCC) still plans on murdering the President on his trip to Germany in May, 1985. Mr Image wants to convince those who have read the "Black-male Bourgeois" artical you the reader has just read, that the usage of the "Image" Prophecy, as this writter has done in exposing the conspiracy to murder the President is not a sure safeguard against personal damage to others who may desire to protect themselves from the "National Council of Churches" (Mr Image) and his comrades. Mr Image is hoping that if he can get away with murdering Mr Ragon, that those people who are waking up and are discovering the power of the prophecy will lose confidence in the power of the Prophecy to protect those who side with it, or who may be counting on its protection. P.S. Mr Image (NCC) is scard to death over the posiability of being exposed by the prophecy of Rev. 13:11-17 & Rev. 14:9-11

TROTT, Circuit Judge, dissenting:

I base my respectful quarrel with the majority opinion primarily on one point: I do not believe it was unreasonable for Special Agents Hunter and Jordan to have come to the informed and trained conclusion that they had reasonable cause to believe that Bryant was the murderous "Mr. Image" who was planning and threatening to kill the President of the United States.

Of course, to those of us who are rational, none of Bryant's behavior makes any sense, *but it did to Bryant*, and this is the point. Fantasy cannot be judged by rational standards. One must suspend disbelief and cope with the fantasizer's world. Agents of the Secret Service do this every day as they cope with unstable people who threaten and stalk public officials. Stable rational people don't attack Presidents. John Hinckley's thought process leading up to his shooting of President Reagan did not make any sense either, but that did not stop him from his assassination attempt. Using the attempted murder of the President to get a date with a movie star is no less strange than either the "thinking" in Bryant's letter or his behavior. Yet the majority opinion insists on measuring what confronted Hunter and Jordan in the field by rational standards.

The majority opinion basically sees this case as though others were up to something and Bryant was not involved; he was just turning them in. It speaks of the threats as not made by Bryant, but only by "Mr. Image," and it asserts that Bryant does not identify with Mr. Image. This completely misses the point. *All* of this was Bryant. There were no "others," and the agents seem to have figured this out quite promptly. People suffering from schizophrenia frequently suffer also from split personality disorders.

After a campus security officer notified them of a plot to kill the President, Hunter and Jordan tried to find out from Bryant more about "Mr. Image." Bryant refused to identify "Mr. Image." To work from the majority opinion's premise, if Bryant did not identify with "Mr. Image" and saw him as his oppressor, why was Bryant reluctant to turn him in? The agents asked Bryant about his own attitude toward the President. He refused to answer. He also refused to state whether he intended to harm President Reagan. Based on the totality of the information presented to them—including the slashing motions Bryant made across his throat coupled with statements by him that the President "should have been killed in Bonn"—Hunter and Jordan concluded *they had probable cause to believe* that Bryant and "Mr. Image" were one and the same deranged person and that his *total behavior* including the letter constituted a threat under section 871.

Under the law, they did not have to be certain or even have proof by a preponderance of the evidence, just probable cause. What the majority opinion does not adequately recognize is that this is a standard that permits mistakes in judgment, assuming *arguendo* that such is the case here.

> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable. The same is true of their conclusions regarding exigent circumstances.

Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (citation omitted). So even assuming a mistake in judgment as to whether Bryant was threatening the President, the issue remains as to whether the mistake was reasonable.

The Supreme Court in *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986), further refined the term "reasonable" in this context: "but if officers of reasonable competence could disagree on this issue [the existence of probable cause], immunity should be recognized."

Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971), illustrates this principle. In *Hill*, police officers with probable cause to arrest Archie Hill mistook Miller for Hill and arrested him instead. They did so even though Miller ardently denied he was Hill and produced evidence indicating his true identity. Police then searched Hill's apartment incident to the mistaken arrest of Miller, and the prosecution later used some of the evidence seized to convict Hill after police resolved the matter of Miller's mistaken identity.

The Supreme Court dismissed Hill's complaint that Miller's arrest was without probable cause with the following observations that I find helpful in resolving the present case:

> The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers'

mistake was understandable and the arrest a *reasonable response to the situation facing them at the time.*

. . . In these circumstances the police were entitled to do what the law would have allowed them to do if Miller had in fact been Hill, that is, to search incident to arrest and to seize evidence of the crime the police had probable cause to believe Hill had committed. When judged in accordance with "*the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,*" *Brinegar v. United States*, 338 U.S. 160, 175 [69 S.Ct. 1302, 1310, 93 L.Ed. 1879] (1949), the arrest and subsequent search were reasonable and valid under the Fourth Amendment.

401 U.S. at 803-05, 91 S.Ct. at 1110-11 (emphasis added).

Let me return for a moment to square one. Probable cause is a deceptively simple description for a complex concept. One commentator has called it "an exceedingly difficult concept to objectify."[1] The following description captures its elusive nature:

> The contours and salient principles of probable cause have been faithfully catalogued in a surfeit of decisional law. . . . Probable cause does not emanate from an antiseptic courtroom, a sterile library or a sacrosanct adytum, nor is it a pristine "philosophical concept existing in a vacuum," but rather it requires a *pragmatic* analysis of "everyday life on which reasonable and prudent men, not legal technicians, act." It

[1] Cook, *Probable Cause to Arrest*, 24 Vand.L.Rev. 317 (1971).

> is to be viewed from that vantage point of a prudent, reasonable, cautious police officer on the scene at the time of the arrest *guided by his experience and training.* It is "a plastic concept whose existence depends on the facts and circumstances of the particular case." Because of the kaleidoscopic myriad that goes into the probable cause mix "seldom does a decision in one case handily dispose of the next." It is however the totality of these facts and circumstances which is the relevant consideration. Viewed singly these factors may not be dispositive, yet when viewed in unison the puzzle may fit.

United States v. Davis, 458 F.2d 819, 821 (D.C.Cir. 1972) (emphasis added) (citations omitted).

This description uses the word "pragmatic" in describing the decision making process that goes into the determination of probable cause. Exactly what this means is best illustrated by another case involving the current jurisdiction of Secret Service Agents: the assassination of Senator Robert Kennedy during his bid to become President of the United States. Shortly after Senator Kennedy was killed, agents searched his assassin's room without a warrant and seized incriminating evidence later used to convict him of murder. Sirhan Sirhan challenged the admissibility of this evidence on appeal, but the California Supreme Court turned back his challenge with this analysis:

> The victim was a major presidential candidate, and a crime of violence had already been committed against him. The crime thus involved far more than possibly idle threats. Although the officers did not have reasonable cause to believe that the house contained evidence of a con-

> spiracy to assassinate prominent political leaders, we believe that *the mere possibility* that there might be such evidence in the house fully warranted the officers' actions. It is not difficult to envisage what would have been the effect on this nation if several more political assassinations had followed that of Senator Kennedy. Today when assassinations of persons of prominence have repeatedly been committed in this country, it is essential that law enforcement officers be allowed to take fast action in their endeavors to combat such crimes.

People v. Sirhan, 7 Cal.3d 710, 739, 497 P.2d 1121, 1140, 102 Cal.Rptr. 385, 404 (1972), *cert. denied*, 410 U.S. 947, 93 S.Ct. 1382, 35 L.Ed.2d 613 (1973), overruled in part on other grounds, *Hawkins v. Superior Court*, 22 Cal.3d 584, 593 n. 7, 586 P.2d 916, 922 n. 7, 150 Cal.Rptr. 435, 441 n. 7 (1978).

That the present case does not involve a completed crime of violence is not a reason to distinguish *Sirhan*; it is a reason to celebrate. We expect the Secret Service to prevent these crimes, not just attend funerals when they occur.

The *Davis* court also emphasized the role that the expertise and special training of the arresting officer plays in the determination of probable cause. This, of course, makes good sense. We spend billions of dollars providing special training for our law enforcement officers. What a waste if we do not rely on it. Here, the Secret Service has a unique and

special mission for which its agents are highly trained. We should be cautious before we second-guess their field decisions as to whether probable cause exists to believe someone is threatening the President, especially in situations involving disturbed people. This comes through loud and clear in *Sirhan*.

This brings us back to the present case. I respectfully believe that the majority opinion dismisses too summarily—only grudgingly discussing the "alter ego" theory—the government's argument, and the agents' belief, that Mr. Bryant was really "Mr. Image," and vice versa. Their belief does not strike me as irrational. It reminds me of a case that illustrates the unpredictable dimensions of homicidal fantasies and the role of the alter ego in demented thought patterns.

In the early 1970s, a madman named Kurbegovic terrorized the City of Los Angeles.[2] He fashioned headlines for his cause by detonating bombs in public places, including the Los Angeles International Airport. Lives were lost, and people were maimed. He dictated extremely bizarre taped messages to the public demanding social change. He claimed on the tapes to be "Esak Rasim," speaking first as a field commander of the "Symbionese Liberation Army" ("SLA") and later as the "Chief Military Officer" of "Aliens of America." Although he denied vigorously in court—after being found competent to stand trial—that he was "Esak Rasim" and that he had anything to do with "Aliens of America" or the SLA, it became clear that he, Kurbegovic, was "Aliens of America." This was his fantasy. Simi-

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[2] The terrifying tale of the Alphabet Bomber's murderous rampage is found in *People v. Kurbegovic*, 138 Cal.App.3d 731, 188 Cal.Rptr. 268 (1982).

larly, in the present case there was no real "Mr. Image," only Mr. Bryant; and "Mr. Image" resided only in one place, in Bryant's brain. In that sense, Bryant was "Mr. Image" even though in his warped thinking "Mr. Image" may have been someone else.

It was not unreasonable here for trained agents of the Secret Service to conclude they had a similarly unstable person on their hands. As in the present case, when the police finally arrested Kurbegovic, he certainly did not admit he was Rasim. It is not uncommon for unstable individuals to adopt identities that are nothing more than strange pseudonyms.

Should the agents have walked away from Bryant, leaving him to his own devices while believing he was "Mr. Image"? Even Bryant's attorney conceded in oral argument that *something* had to be done to monitor him. Why? Given the recent history of assaults on our leaders, it would hardly have been "prudent" to have ignored Bryant and let him go his own way.

So who finally ends up in court? Not Bryant, just the agents. It is one thing to expect agents of the Secret Service to throw themselves in front of assassins' bullets. That is a known risk they all willingly incur. It is another altogether to throw them in front of lawsuits in cases like this. This case is precisely what qualified immunity is designed to protect agents like Hunter and Jordan against: being sued for reasonably doing their job.

Measuring all of this against the controlling law, I would reverse the denial of summary judgment on this claim, for several reasons.

First, *no* case on the books in this circuit discusses the contours of probable cause to make an arrest for a violation of section 871, not one. It may be "clearly established" that authorities need probable cause to make an arrest, but case law has not developed or

defined what constitutes probable cause in a given situation. *Cf. Capoeman v. Reed*, 754 F.2d 1512 (9th Cir.1985). Because of the uniquely unstable people who run afoul of section 871, I think this dearth of authority is relevant. Second, I believe for the reasons discussed earlier that the agents had probable cause to arrest Bryant and to believe the letter coupled with his conduct constituted a threat against the President. At the very least, "officers of reasonable competence could disagree on this issue." *Malley*, 475 U.S. at 341, 106 S.Ct. at 1096.

Third, *Malley* makes it clear that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* Hunter and Jordan do not qualify as unprotected under this standard. After they arrested Bryant, a *magistrate*—who enjoys absolute immunity—found probable cause to hold him for 14 days before releasing him when the United States Attorney in the exercise of his judgment decided not to prosecute. Moreover, not a scintilla of evidence exists that either agent was acting in bad faith. Leaving Hunter and Jordan out in the cold thus disserves the purpose of qualified immunity. It is unseemly that we, the judiciary, clothe ourselves in absolute immunity and leave the agents to take the hits.

Fourth, Hunter and Jordan professionally discharged their unique role in the criminal justice process: they arrested Bryant and deposited him in the system for the lawyers to figure all of this out. Maybe it was a harmless fantasy, maybe it was not. Maybe "Mr. Image" was a figment of Bryant's imagination. Maybe Mr. Bryant was incompetent to stand trial. This was for lawyers to sort out. not agents.

The Supreme Court calls upon us in *Davis v. Scherer*, 468 U.S. 183, 196, 104 S.Ct. 3012, 3020, 82

L.Ed.2d 139 (1984), to recognize the demands of the real world in measuring activity by members of the executive branch:

> Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers or prison wardens, to say nothing of higher level executives who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively." See P. Schuck, Suing Government 66 (1983). In these circumstances, officials should not err always on the side of caution. "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office."

Today we have failed to give that message due consideration.

As to the second issue in this case, I agree with the majority's analysis, but as to the primary question, I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 86-3134 WJR (Kx)

JAMES VERNON BRYANT, JR., PLAINTIFF

v.

JEFF JORDAN and BRIAN HUNTER, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SUMMARY JUDGMENT; ORDER OF PARTIAL SUMMARY JUDGMENT

[Filed Feb. 29, 1988]

The matter of Defendants' Motion for Summary Judgment having come on regularly for hearing before this Court, the Court having considered the papers filed in support thereof and in opposition thereto and having heard oral argument,

IT IS HEREBY ORDERED that the Motion is GRANTED IN PART. The Court finds as follows:

FACTUAL BACKGROUND

On May 3, 1985, defendant Secret Service Special Agent Brian Hunter ("Hunter") was notified by the University of Southern California ("USC") that plaintiff James Bryant ("Bryant") had written a letter which contained references to a plot to assassinate the President. Bryant left a copy of this letter on campus. The somewhat rambling and confused

letter stated, among other things, that the National Council of Negro Women and "Mr. Image," (identified as communist white men within the National Council of Churches), were planning to kill the President, and that plaintiff had saved the President's life by exposing the "Lybian Hit Squad" assassination attempt.

Later that day, defendant Hunter and defendant Special Agent Jeff Jordan ("Jordan") interviewed plaintiff at his residence in Los Angeles. During this meeting plaintiff admitted to defendants that he wrote the letter, but refused to identify "Mr. Image." After allegedly obtaining Bryant's consent, the agents searched his residence and found the original letter. The search revealed no other incriminating or dangerous articles. Nevertheless, without a warrant, the agents arrested Bryant for violation of 18 U.S.C. Section 871 (threatening to take the life of or to inflict bodily harm upon the President of the United States). Shortly thereafter, plaintiff was sent to the LAPD's Central Jail where he was detained for fourteen days. On May 17, 1985, the government dismissed the criminal action against Bryant.

Bryant filed an administrative claim protesting the agents' actions on October 1, 1985. The Treasury Department/Secret Service denied the claim on December 11, 1985. Plaintiff filed an original Complaint in May, 1986 and an Amended Complaint on January 27, 1987 in this Court.

In March, 1987, defendants submitted a Motion to Dismiss this action pursuant to Fed. R. Civ. P. 12(b). The Motion was granted in part. Counts I through IV against the United States, the Director of the Secret Service, the Secret Service and the Department of the Treasury were dismissed. The Court

did not dismiss Counts V and VI against agents Hunter and Jordan.

Counts V and VI are claims for damages brought under the theory enunciated in *Bivens v. Six Unknown Named Agents of the Federal Bureau*, 403 U.S. 388 (1971). In Count V plaintiff alleges that the agents violated his Fourth Amendment rights by arresting him without probable cause and without an arrest warrant. Plaintiff also alleges that the warrantless search of his residence violated the Fourth Amendment. Plaintiff further alleges that the agents violated his rights to due proces under the Fourteenth Amendment and to equal protection under the Fifth Amendment.

In Count VI plaintiff alleges that the agents violated his Sixth Amendment right to be apprised of the nature and the cause of the accusation against him.

DISCUSSION

Based upon the facts recited above, plaintiff's Fifth, Sixth and Fourteenth Amendment claims are dismissed for the following reasons:

Neither the allegations in the Amended Complaint nor the record presented by plaintiff supports an equal protection claim. Plaintiff has made no allegations nor presented any facts demonstrating invidious discrimination or discriminatory intent by the defendant agents. Since there are no genuine issues of material fact and defendants are entitled to judgment as a matter of law, plaintiff's Fifth Amendment claim should be dismissed. *See Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S. Ct. 2505, 2510 (1986). Alternatively, this claim should be dismissed because defendants are entitled to qualified immunity, since their alleged conduct did not

violate the clearly established law under the equal protection component of the Fifth Amendment. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Plaintiff similarly has provided no basis for his Sixth Amendment claim. Plaintiff has not alleged any facts supporting his assertion that defendants deprived him of his right to be informed of the nature and the cause of the allegation against him. Accordingly, this claim must be dismissed. *See Anderson, supra.* Moreover defendants are also entitled to qualified immunity on this claim. *See Harlow, supra.*

Plaintiff's Fourteenth Amendment claim is also deficient because plaintiff has not alleged that defendants were acting under color of state law. A violation of Fourteenth Amendment rights can occur "only when committed by one who is 'clothed with the authority of the state . . . purporting to act thereunder.'" *Martin v. Pacific Northwest Bell Telephone Company*, 441 F.2d 1116, 1118 (9th Cir. 1971) (citation omitted). This claim must thus be dismissed. *See Anderson, supra.*

Plaintiff's Fourth Amendment claim based on a warrantless search of his residence also cannot stand. The defendants contend, and the plaintiff does not dispute, that Bryant consented to the agents' search of his residence. Officers conducting a search pursuant to consent need not obtain a warrant. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Since, under the facts submitted by defendants, they are entitled to judgment as a matter of law, this claim should be dismissed. *See* Fed. R. Civ. P. 56(e); *Anderson, supra.*

Plaintiff's Fourth Amendment claims based on arrest without probable cause and without a warrant, however, cannot be dismissed. A genuine factual dis-

pute still exists concerning whether the defendants had probable cause to arrest plaintiff—whether, at the moment of arrest, the facts and circumstances within the knowledge of the arresting officers and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that Bryant had violated 18 U.S.C. Section 871(a). *See Beck v. Ohio*, 379 U.S. 89, 91 (1964). Plaintiff is thus entitled to full adjudication of these claims. *Anderson, supra.* Furthermore, because it is not clear whether the agents arrested Bryant without probable cause and in violation of his clearly established Fourth Amendment rights, defendants are not shielded from liability under the doctrine of qualified immunity. *See Harlow, supra.*

For all the above reasons, IT IS HEREBY ORDERED that:

(1) Plaintiff's claim based on violation of his Fifth Amendment rights is dismissed with prejudice;

(2) Plaintiff's claim based on violation of his Sixth Amendment rights is dismissed with prejudice;

(3) Plaintiff's claim based on violation of his Fourteenth Amendment rights is dismissed with prejudice;

(4) Plaintiff's Fourth Amendment claim based on a warrantless search of his residence is dismissed with prejudice; and,

(5) Plaintiff's Fourth Amendment claims based on arrest without probable cause and without a warrant are not dismissed.

Dated: Feb. 25, 1988

/s/ William J. Rea
WILLIAM J. REA
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-5889

D.C. No. CV-86-3134-WJR

JAMES V. BRYANT, JR., PLAINTIFF-APPELLEE

v.

UNITED STATES TREASURY DEPARTMENT,
SECRET SERVICE, DEFENDANT

and

JEFF JORDAN; BRIAN V. HUNTER,
DEFENDANTS-APPELLANTS

ORDER

[Filed Nov. 5, 1990]

Before: SCHROEDER, FLETCHER, and TROTT, Circuit Judges.

Judges Schroeder and Fletcher have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Trott would have granted the petition for rehearing and the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. CA-88-5889

DC #CV-86-3134-WJR

JAMES V. BRYANT, JR., PLAINTIFF-APPELLEE

v.

UNITED STATES TREASURY DEPARTMENT,
SECRET SERVICE, DEFENDANT

and

JEFF JORDAN; BRIAN V. HUNTER,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered 5/18/90

APPENDIX E

DECLARATION OF BRIAN V. HUNTER

I, Brian V. Hunter, declare under penalty of perjury as follows:

1. I am a Special Agent with the United States Secret Service and have been so employed since June 1983. From June 1983 to the present I have been assigned to the Secret Service Los Angeles Field office. In May 1985 I was a member of the field office's protective intelligence squad, the squad designated to investigate threats upon the President of the United States and individuals who are afforded protection by the Secret Service. Before joining the Secret Service I was a police officer with La Verne Police Department.

2. While I was on duty on May 3, 1985, I was telephonically contacted by a Sergeant Mike Kennedy of the University of Southern California's (USC) campus security. Kennedy told me that earlier that day an individual identifing himself as James V. Bryant had delivered two photocopies of a handwritten letter to two offices on the USC campus. (A copy of the subject letter is attached as Exhibit A). Kennedy told me that one copy of the letter had been left at the USC president's office and had left the other at the University's budget office. Kennedy informed me that the letter contained references to murdering President Reagan, assassination attempts and Libyan "hit" squads.

3. I responded to the USC campus the same day and obtained the copies of the letter from Sgt. Kennedy. I read a copy of the letter and noted that the letter made reference to a "Mr. Image" wanting to make another assassination attempt on President

Reagan while the President was touring Germany in May 1985, and that the President had survived two assassination attempts by "Mr. Image". The letter also made reference to the attempted assassination of President Reagan by John Hinckley, to Libyan hit squads, and to a conspiracy to murder the President. The letter indicated that "Mr. Image" was a participant in such conspiracy.

4. After reading the letter, I interviewed the two USC employees who had received the photocopies of the letter. Ms. Veronica Tincher told me that she was working in the USC Budget Office on May 3, 1985 when she was given the photocopy of the letter by a man. She described the man as black, approximately 5'8" in height, as 160 pounds. Tincher said that the man told her to give the photocopy of the letter to the director of the Budget Office. Tincher told me that the man made statements about 'bloody coups' and 'assassination'. Tincher also told me that the man said something about 'across the throat', while simultaneously moving his hand horizontally across his throat to simulate a cutting action.

5. Ms. Elvia Hauser, who was employed in the USC president's office, told me that she was given the photocopy of the letter by a man, who instructed her to forward the letter to the president of USC. Hauser said that the man told her that 'He should have been assassinated in Bonn'. Hauser said that the man also identified himself as James V. Bryant on a piece of paper that he left with her.

6. Based on the letter's content, particularly its references to another assassination attempt to be made on President Reagan's life, Libyan hit squads, the Hinckley assassination attempt, and to a conspiracy to murder President Reagan, on the state-

ments attributed by Ms. Tincher and Ms. Hauser to the man, who delivered the photocopies of the letter to the USC campus, and my training and experience as a Secret Service agent, I determined that further investigation of the matter was warranted.

7. Through news reports by the mass media and intelligence sources within the Secret Service, I was aware that there was concern at that time that Libyan hit squads may have been dispatched to the United States to assassinate high ranking officials of our government. I was aware additional security precautions were being undertaken in Washington, D.C. by the Secret Service to ensure the President's safety and that of other members of our government afforded protection by the Secret Service. Although the letter was written in a rambling and confused fashion its tone did not appear to suggest a prank. I believed that President Reagan's movements and whereabouts were being monitored by the letter's author, because the letter referred to President Reagan's visit to Germany and I knew that the President was visiting West Germany at that time. What's more, I had been advised by Ms. Hauser that the man who delivered the letter had stated to her that 'he should have been assassinated in Bonn.' Given the context in which this statement was made I inferred that the speaker was referring to the President. I also knew that President Reagan, maintained a residence in Santa Barbara, California and frequently visited the Los Angeles area on trips to the western White House. In light of all the foregoing information, I considered it my duty as a Secret Service agent to conduct additional investigation to determine the identity of the letter's author, the author's sources of information and the identity of the

individual referred to as "Mr. Image" in the letter. I believed at that time that the letter contained threats to take the President's life or to inflict serious bodily harm upon him.

8. I advised my supervisor at the Secret Service Los Angeles Field Office about the investigation that I had conducted at USC concerning the letter. I requested the assistance of another Secret Service agent in order to continue the investigation into the circumstances underlying the letter and its contents. Secret Service Special Agent (SA) Jeffrey Jordan was assigned to assist me.

9. On the evening of May 3, 1985, SA Jordan and I went to 3201 1/2 W. 43rd Place in Los Angeles, which was one of the addresses listed on the subject letter. We knocked on the door and announced ourselves as law enforcement officers. A black male adult, who later identified himself as James Vernon Bryant, answered the door and held it partially ajar. SA Jordan and I identified ourselves as Secret Service agents both orally and by displaying our official credentials. Bryant then orally identified himself and told us there was no one else, inside the residence. Either SA Jordan or I asked if we could come inside the residence to speak with him. Bryant gave us permission to enter the residence.

10. Upon entering the residence, we again asked Bryant whether there were anyone else in the residence and whether he had any weapons. Bryant assured us that he was alone and had no weapons. I asked Bryant if he had any objection to my checking the residence to assure myself that there were no other occupants and no weapons in plain view. Bryant told me that he had nothing to hide and told me that I could check the residence. I then conducted a

protective sweep of the residence, quickly inspecting each room, to look for occupants and weapons in plain view. The protective sweep took only a few minutes to complete. I did not see anyone else in the plaintiff's residence, nor did I observe any weapons in plain view. SA Jordan remained with the plaintiff while I conducted the protective sweep of the residence.

11. After completing the protective sweep, I rejoined the plaintiff and SA Jordan both of whom were seated in the living room area of the residence. I told Bryant that we had come to his residence because of the two photocopies of the letter that had been delivered to the USC campus. I showed Bryant one of the photocopies of the letter and asked him if he had written the letter. Bryant admitted writing the letter and leaving the two photocopies of it at the USC campus. I then asked Bryant who was the person referred to as "Mr. Image" in the letter. Bryant responded to my question in a rambling and confused manner refusing to identify "Mr. Image".

12. I then asked Bryant for permission to search the residence. Bryant again told me that he had nothing to hide and gave me permission to search the residence. I searched the residence while SA Jordan remained in the living room with the plaintiff. During the course of the search I found the original of the subject letter in a dresser drawer in the residence's bedroom. The original letter was the only item that I seized during my search of the residence.

13. Following the search of the plaintiff's residence, I rejoined SA Jordan and Bryant in the living room. I showed SA Jordan the original letter. SA Jordan advised the plaintiff of his *Miranda* rights using a preprinted Secret Service form. Bryant acknowledged that he understood his rights and agreed to speak to us. SA Jordan and I asked Bryant again about the identity of Mr. Image . Bryant responded in a rambling and confused fashion, such that I could not discern the identity of Mr. Image or whether there was actually a person known as Mr. Image. Bryant responded in the same rambling and confused fashion to our inquiries about the subject letter's references to Libyan hit squads and a planned assassination attempt on the life of President Reagan. At this point I advised the plaintiff that he was being arrested for threatening to take the life of the President and to inflict serious bodily harm upon the President in violation of 18 U.S.C. § 871.

14. I believe in good faith that probable cause existed to arrest Bryant for threatening to take the life of and to inflict serious bodily harm upon the President in light of the following facts:

(a) the subject letter contained references to an attempt to be made upon President Reagan's life and to inflict bodily harm to him;

(b) that Bryant admitted to being the author of the letter and had the original letter in his residence;

(c) Bryant's admission that he had delivered the two photocopies of the letter to the USC campus;

(d) Bryant's statement to Elvia Hauser that 'He should have been assassinated in Bonn', which I inferred to be a reference to the President who was on an official visit to West Germany at that time;

(e) Bryant's statements to Veronica Tincher, and the gesture he made in her presence by moving his hand horizontally across his throat to simulate a cutting action. Such gesture I construed in light of all the attendant facts and circumstances, as a symbolic

gesture of an intention to inflict serious bodily injury or assassinate the President;

(f) The subject letter contained information indicating that Bryant was aware of the President's movements and current whereabouts;

(g) President Reagan maintained a residence in Santa Barbara, California and frequently visited the Los Angeles area while staying at his Santa Barbara residence;

(h) I believed that the use of the term Mr. Image may have been a pseudonym for Bryant and that Bryant was writing in the third person; and

(i) My training and experience as a Secret Service agent.

15. In addition to the aforementioned facts, the rambling and confused nature of Bryant's responses to our questions made me believe that Bryant was not mentally stable, and I was concerned that Bryant might pose a threat to the President's well being.

16. Following Bryant's arrest, SA Jordan and I transported him to office for processing relative to the arrest. We advised the duty Assistant United States Attorney (AUSA) of the arrest and were instructed by the duty AUSA that Bryant should be brought before a United States Magistrate on Monday, May 6, 1985 for the filing of a criminal complaint and his arraignment on such complaint. After the completion of processing procedures at the Secret Service office SA Jordan and I subsequently took Bryant to the holding facility at the Los Angeles Police Department's Parker Center, where he was held in connection with the arrest.

17. On May 6, 1985, Bryant was released to our custody and then brought before a United State Magistrate Ralph J. Geffen for arraignment on a criminal complaint charging him with threatening to take the life of, and to inflict serious bodily harm, upon the President of the United States in violation of 18 U.S.C. § 871. I subscribed the affidavit in support of the criminal complaint. Bryant was ordered held without bond on the 18 U.S.C. § 871 violation pending a detention hearing.

I declare under penalty of perjury that the foregoing is true.

DATED: December 28, 1987.

/s/ Brian V. Hunter
BRIAN V. HUNTER

DECLARATION OF JEFFREY S. JORDAN

I, Jeffrey S. Jordan, declare under penalty of perjury, as follows:

1. I am presently employed as a special agent with the United States Customs Service. From March 1983 to June 1987, I was employed as a special agent with the United States Secret Service. Before joining the Secret Service, I was employed by the Naval Investigative Service as a special agent from approximately February 1981 to March 1983. I also served four years in the United States Army as a captain with the military police.

2. In May 1985, I was assigned to the Secret Service's Los Angeles Field Office, and was a member of the protective intelligence squad. The protective intelligence squad has as its responsibility the investigation of threats against the life of the President, and all other individuals who are afforded protection by the Secret Service. I became a member of this squad in October 1984.

3. On May 3, 1985, I was assigned by the supervisor of the protective intelligence squad to assist United States Secret Service Special Agent (SA) Brian V. Hunter in the investigation of a possible threat against the life of the President. SA Hunter advised me that he had been contacted earlier that same day by the campus police at the University of Southern California (USC) about a possible threat against the life of the President. Hunter told me that he had gone to the USC campus and obtained some documents from the campus security and conducted interviews of individuals at the USC campus. SA Hunter showed me the documents that he received from the USC campus security. SA Hunter

also infomed me about the statements that had been made to him by the two individuals at the USC campus, who had received the documents. I reviewed the documents that SA Hunter had obtained from the USC campus. I noted that the documents were two photocopies of the same letter.

4. I read one of the copies of the letter and noted that the letter made reference to a "Mr. Image" wanting to make another assassination attempt on President Reagan while the President was touring Germany in May 1985, and that letter also made reference to the fact that the President had survived two prior assassination attempts by "Mr. Image." The letter also made reference to the attempted assassination of President Reagan by John Hinckley, to Libyan hit squads, and to a conspiracy to murder the President. The letter indicated that "Mr. Image" was a participant in such conspiracy.

5. On the evening of May 3, 1985, SA Hunter and I went to 3201-1/2 West 43rd Place in Los Angeles, which was one of the addresses listed on the subject letter. We knocked on the door and announced ourselves as law enforcement officers. A black male adult, who later identified himself as James Vernon Bryant, answered the door and held it partially ajar. SA Hunter and I then identified ourselves as Secret Service agents, both orally and by displaying our official credentials. Bryant orally identified himself and told us that there was no one else inside the residence. Either SA Hunter or I asked if we could come inside the residence to speak with Bryant. Bryant gave us permisison to enter the residence.

6. Upon entering the residence, we again asked Bryant whether there were anyone else in the resi-

dence. Bryant assured us that he was alone and that he had no weapons. SA Hunter asked Bryant if he had any objection to Hunter checking the residence to ensure that there were no other occupants and no weapons inside the residence. Bryant said that he had nothing to hide and told SA Hunter that he could check the residence. SA Hunter then left the living room area of the residence to conduct a protective sweep of the residence. I remained with Bryant in the living room of the residence while SA Hunter was conducting the protective sweep. A few minutes later, Hunter rejoined the plaintiff and myself in the living room area of the residence. Hunter told me that there were no other occupants inside the residence and that he had not seen any weapons during the protective sweep.

7. Hunter then explained to Bryant our purpose in coming to his residence. SA Hunter told Bryant that we had come to his residence because of the two photocopies of the subject letter that had been delivered to the USC campus. SA Hunter showed Bryant one of the photocopies of the letter and asked him if he (Bryant) had written the letter. Bryant admitted writing the letter and also admitted leaving the two photocopies of the letter at the USC campus. SA Hunter then asked Bryant who was the person referred to as "Mr. Image" in the letter. Bryant responded to the question in a rambling and confused manner, refusing to identify "Mr. Image".

8. SA Hunter then asked Bryant for permission to search the residence. Hunter told Bryant that we were looking for any letters or any other documents that might contain threats against the life of the President, as well as for any weapons. SA Hunter told Bryant that he did not have to permit us to

search his residence. Bryant again told us that he had nothing to hide and gave SA Hunter permission to search the residence.

9. I spoke to Bryant while SA Hunter was searching the residence. Bryant refused to answer any questions concerning his attitudes and feelings towards the President, and refused to state whether he intended to harm the President. Following the completion of his search of the residence, SA Hunter showed me the original subject letter. SA Hunter advised me that he had found the subject letter in a dresser drawer in the residence bedroom. We then jointly decided that Bryant should be advised of his *Miranda* rights, which I did by reading from a preprinted Secret Service form.

10. Bryant acknowledged that he understood his rights and agreed to speak to us. SA Hunter and I again asked Bryant about identity of Mr. Image. Bryant responded in a rambling and confused fashion, such that I could not discern the identity of Mr. Image or whether there was actually a person known as Mr. Image. Bryant responded in the same rambling and confused fashion to our questions about the subject letter's references to Libyan hit squads and a planned assassination attempt on the life of President Reagan. SA Hunter then advised Bryant that he was being arrested for threatening to take the life of the President and to inflict serious bodily harm upon the President in violation of 18 U.S.C. § 871.

11. I believed in good faith that probable cause existed to arrest Bryant for threatening to take the life and to inflict serious bodily harm upon the President in light of the following facts:

(a) The subject letter contained references to an assassination attempt to be made upon President Reagan's life and to inflict serious bodily harm to him;

(b) Bryant admitted to having written the subject letter and had the original letter in his residence;

(c) Bryant's admission that he had delivered the two photocopies of the letter to the USC campus;

(d) Bryant's statement to Elvia Hauser that "he should have been assassinated in Bonn," which I inferred to be a reference to the President, who was on an official visit to West Germany at the time;

(e) Bryant's statements to Veronica Tincher, and the gesture he made in her presence by moving his hand horizontally across his throat to simulate a cutting action. Such gesture I construed, in light of all the attendant facts and circumstances, as a symbolic gesture of an intention to inflict bodily injury upon or assassinate the President;

(f) The subject letter contained information indicating that Bryant was aware of the President's movements and current whereabouts;

(g) President Reagan maintained a residence in Santa Barbara, California and frequently visited the Los Angeles area while staying at his Santa Barbara residence;

(h) I believed that the use of the term Mr. Image may have been a pseudonym for Bryant and that Bryant was writing in the third person; and

(i) My training and experience as a Secret Service agent.

12. In addition to the aforementioned facts, the rambling and confused nature of Bryant's responses to our questions made me believe that Bryant was not mentally stable, and I was concerned that Bryant might pose a threat to the President's well being.

13. Following Bryant's arrest, SA Hunter and I transported him to our office for processing relative to the arrest. We advised the duty Assistant United States Attorney (AUSA) of the arrest. We were in turn instructed by the duty AUSA that Bryant should be brought before a United States Magistrate on Monday, May 6, 1985, for the filing of a criminal complaint and his arraignment on such complaint. After the completion of the processing procedures at the Secret Service office, SA Hunter and I took Bryant to the holding facility at the Los Angeles Police Department's Parker Center, where he was held in connection with the arrest.

14. On May 6, 1985, Bryant was released to our custody and then brought before United States Magistrate Ralph J. Geffen for arraignment on a criminal complaint charging him with threatening to take the life of, and to inflict serious bodily harm, upon the President of the United States, in violation of 18 U.S.C. § 871. Magistrate Geffen ordered Bryant held without bond on the 18 U.S.C. § 871 violation, pending a detention hearing.

I declare under penalty of perjury that the foregoing is true.

DATED: Dece ber 23, 1987.

/s/ Jeffrey S. Jordan
JEFFREY S. JORDAN

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EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

BRIAN V. HUNTER AND JEFFERY JORDAN
v. JAMES V. BRYANT, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–1440. Decided December 16, 1991

PER CURIAM.

On May 3, 1985, respondent James V. Bryant delivered two photocopies of a handwritten letter to two administrative offices at the University of Southern California. The rambling letter referred to a plot to assassinate President Ronald Reagan by "Mr Image," who was described as "Communist white men within the National Council of Churches." The letter stated that "Mr Image wants to murder President Reagan on his up and coming trip to Germany," that "Mr Image had conspired with a large number of U. S. officials in the plot to murder President Reagan" and others, and that "Mr Image (NCC) still plans on murdering the President on his trip to Germany in May, 1985." See *Bryant* v. *United States Treasury Department, Secret Service*, 903 F. 2d 717, 724–727 (CA9 1990) (Bryant's letter). President Reagan was traveling in Germany at the time.

A campus police sergeant telephoned the Secret Service, and agent Brian Hunter responded to the call. After reading the letter, agent Hunter interviewed University employees. One identified James Bryant as the man who had delivered the letter and reported that Bryant had "told her '[h]e should have been assassinated in Bonn.'" Another employee said that the man who delivered the letter made statements about " 'bloody coups' " and " 'assassination,' " and said something about " 'across the throat' " while moving his hand horizontally across his throat to simulate a cutting action. *Id.*, at 718–719.

Hunter and another Secret Service agent, Jeffrey Jordan, then visited a local address that appeared on the letter. Bryant came to the door and gave the agents permission to enter. He admitted writing and delivering the letter, but refused to identify " 'Mr. Image' " and answered questions about " 'Mr. Image' " in a rambling fashion. Bryant gave Hunter permission to search the apartment, and the agent found the original of the letter. While the search was underway, Jordan continued questioning Bryant, who refused to answer questions about his feelings toward the President or to state whether he intended to harm the President. *Id.*, at 719.

Hunter and Jordan arrested Bryant for making threats against the President, in violation of 18 U. S. C. § 871(a).[1] Bryant was arraigned and held without bond until May 17, 1985, when the criminal complaint was dismissed on the Government's motion.

Bryant subsequently sued agents Hunter and Jordan, the United States Department of the Treasury, and the Director of the Secret Service, seeking recovery under the Federal Tort Claims Act and alleging that the agents had violated his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). The District Court dismissed all defendants other than agents Hunter and Jordan and all causes of action other than Bryant's Fourth Amendment claims for arrest without probable cause and

[1] 18 U. S. C. § 871(a) provides:

"Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

without a warrant. The court denied the agents' motion for summary judgment on qualified immunity grounds.

On appeal, a Ninth Circuit panel held that the agents were entitled to qualified immunity for arresting Bryant without a warrant because, at that time, the warrant requirement was not clearly established for situations in which the arrestee had consented to the agents' entry into a residence. 903 F. 2d, at 723–724.

However, the panel divided on the question of whether the agents were entitled to immunity on the claim that they had arrested Bryant without probable cause. The majority concluded that the agents had failed to sustain the burden of establishing qualified immunity because their reason for arresting Bryant — their belief that the " 'Mr. Image' " plotting to kill the President in Bryant's letter could be a pseudonym for Bryant — was not the most reasonable reading of Bryant's letter:

> "Even accepting the 'alter ego' theory that by warning what Mr. Image was going to do, Mr. Bryant was in fact communicating what he himself planned to do, the letter read in its entirety does not appear to make a threat against the president. Most of the letter does not even talk about President Reagan. *A more reasonable interpretation of the letter might be that Bryant was trying to convince people of the danger Mr. Image and the conspiracy posed rather than that Bryant was speaking through Mr. Image.*" *Id.*, at 722 (emphasis added)

Our cases establish that qualified immunity shields agents Hunter and Jordan from suit for damages if "a reasonable officer could have believed [Bryant's arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." *Anderson* v. *Creighton*, 483 U. S. 635, 641 (1987). Even law enforcement officials who "reasonably but mistakenly conclude that probable cause is present" are entitled to immunity. *Ibid.* Moreover, because "[t]he entitlement is an *immunity from*

suit rather than a mere defense to liability," *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985), we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982); *Davis* v. *Scherer*, 468 U. S. 183, 195 (1984); *Mitchell*, *supra*, at 526; *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986); *Anderson*, *supra*, at 646, n. 6.

The decision of the Ninth Circuit ignores the import of these decisions. The Court of Appeals' confusion is evident from its statement that "[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach." 903 F. 2d, at 721. This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. See *Mitchell*, *supra*, at 527–529. Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Under settled law, Secret Service agents Hunter and Jordan are entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest Bryant. Probable cause existed if "at the moment the arrest was made . . . the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that Bryant had violated 18 U. S. C. § 871. *Beck* v. *Ohio*, 379 U. S. 89, 91 (1964).

When agents Hunter and Jordan arrested Bryant, they possessed trustworthy information that Bryant had written a letter containing references to an assassination scheme directed against the President, that Bryant was cognizant of the President's whereabouts, that Bryant had made an oral statement that "[h]e should have been assassinated in Bonn," 903 F. 2d, at 719, and that Bryant refused to

answer questions about whether he intended to harm the President. On the basis of this information, a magistrate ordered Bryant to be held without bond.

These undisputed facts establish that the Secret Service agents are entitled to qualified immunity. Even if we assumed, *arguendo*, that they (*and* the magistrate) erred in concluding that probable cause existed to arrest Bryant, the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken. *Anderson*, *supra*, at 641.

The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley*, *supra*, at 343, 341. This accommodation for reasonable error exists because "officials should not err always on the side of caution" because they fear being sued. *Davis*, *supra*, at 196. Our national experience has taught that this principle is nowhere more important than when the specter of Presidential assassination is raised.

The petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

BRIAN V. HUNTER AND JEFFERY JORDAN
v. JAMES V. BRYANT, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–1440. Decided December 16, 1991

JUSTICE SCALIA, concurring in the judgment.

In my view the Ninth Circuit's opinion purported to apply the standard for summary judgment that today's opinion demands. Its error was in finding, on the facts before it, that the standard was not met. Since I think it worthwhile to establish that this Court will not let such a mistake stand with respect to those who guard the life of the President, I concur in the summary reversal.

EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

BRIAN V. HUNTER AND JEFFERY JORDAN
v. JAMES V. BRYANT, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-1440. Decided December 16, 1991

JUSTICE STEVENS, dissenting.

The question in this case is *not* whether a reasonable officer could have believed that respondent posed a threat to the life of the President. Those "who guard the life of the President," *ante*, at 1 (SCALIA, J., concurring in judgment), properly rely on the slightest bits of evidence—nothing more than hunches or suspicion—in taking precautions to avoid the ever-present danger of assassination. Mere suspicion is obviously a sufficient justification for a host of protective measures such as, for example, careful surveillance of a person like respondent. The question that is presented, however, is whether a reasonable trained law enforcement officer could have concluded that the evidence available to petitioners at the time they arrested respondent constituted probable cause to believe that he had committed the crime of threatening the life of President Reagan.

The evidence on which the officers relied to support their conclusion that probable cause existed is summarized in two affidavits which they filed in support of their motion for summary judgment. That evidence includes three relevant components: (1) a rambling, confusing letter written by respondent contained statements indicating that a "Mr Image" intended to assassinate the President while he was in Germany; (2) the officers "believed that the use of the term Mr. Image may have been a pseudonym for [respondent] Bryant and that Bryant was writing in the third person," App. to Pet. for Cert. 48a, 54a.; and (3) when

respondent delivered a copy of the letter to Veronica Tincher in the budget office of the University of Southern California, he "said something about 'across the throat', while simultaneously moving his hand horizontally across his throat to simulate a cutting action," *id.*, at 43a.

The affidavits explained that in addition to the above facts, the affiants were "concerned that Bryant might pose a threat to the President's well-being." *Id.*, at 48a, 54a. It is also noteworthy that when the officers visited Bryant in his apartment, he allowed them to enter and voluntarily consented to a search for weapons in plain view, and then to a second search of the entire residence. That search resulted in nothing more than the discovery of the original of the letter.

The letter is the key piece of evidence supposedly justifying a finding that the officers reasonably believed that Bryant had threatened the life of the President. Bryant freely admitted to writing the letter, and the letter does refer to, among other things, a scheme to assassinate President Reagan. The letter does not, however, state that it is Bryant who intends to assassinate the President. Rather, the letter warns that "Mr Image" intends to harm the President. Nor does the letter leave the identity of "Mr Image" in doubt. In its first sentence, the letter identifies the term parenthetically: "Mr 'Image' (Communist white men within the 'National Council of Churchs)." *Bryant* v. *United States Treasury Department, Secret Service*, 903 F. 2d 717, 724 (CA9 1990) (reprinting Bryant's letter). The letter then proceeds to explain the derivation of the term: "The name 'Image to the Beast' is a biblical name given to and identifys the National Council of Churches as a body . . . though the NCC is composed largely of women, it is men who really control it. So it is appropriate to respectfully address the NCC as Mr IMAGE!" *Ibid.* A postscript to the letter further specifies the Biblical origin of the term and its identification with the National Council of Churches: "Mr Image—(NCC) is scard to death over the posiability of being exposed by the prophecy of Rev. 13:11-17 & Rev. 14:9–11."[1] *Id.*, at 727. At other places in the letter, as well, "Mr Image" is identified with the National Council of Churches through parenthetical references.

Bryant's letter advances a conspiracy theory accusing the National Council of Churches of spreading communism and scheming to assassinate the President.[2] Such a theory is of course absurd, but this absurdity does not mean that Bryant was threatening to harm the President. A vast gap separates the conclusion that a letter warning of an assassination threat is preposterous or delusional and the conclusion that the letter, itself, constitutes a threat by the author. Even if a delusional warning may serve to identify the author as mentally unstable and justify appropriate

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[1] In the original, "(NCC)" is written above the word "Image," and the connecting arrow runs downward. Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment in No. CV 86–3134 (CD Cal.), p. 61. The arrow is omitted in the copy of the letter reprinted in the Court of Appeals' opinion.

[2] The National Council of Churches has at times come under attack for allegedly supporting subversive activity. In 1983, for example, such charges were leveled against the National Council of Churches in a segment of the television program "60 Minutes" and in an article appearing in the Reader's Digest, Isaac, Do You Know Where Your Church Offerings Go?, Reader's Digest, January 1983, pp. 120–125. The president of the National Council of Churches responded to media reports by stating "'[T]he National Council of Churches is not a worldwide socialist conspiracy . . . [It] does not supply arms to communists, revolutionaries, or anyone else. The National Council of Churches does not believe in the violent overthrow of any government.'" Christian Science Monitor, May 5, 1983, p. 3 (reporting speech of Bishop James Armstrong, president of the National Council of Churches). For reports of criticism of the National Council of Churches closer in time to the incident at issue here, see, e. g., Los Angeles Times, April 27, 1985, part 2, p. 5, col. 1 (reporting statement by Peter Reddaway of London School of Economics that "'[w]ittingly or unwittingly, the NCC is deeply involved in concealing and distorting the truth about the Soviet Union . . .'"); *id.*, April 25, 1985, part 5, p. 1, col. 2 (reporting statement by associate professor of history at Seattle Pacific University that the National Council of Churches "has done a disservice to Christians in the Soviet Union by 'buying the Soviet line' as handed to them by official Soviet church leaders . . .").

surveillance of his activities, such legitimate concern does not transform a delusional warning into a threat. As I suggested at the outset, the confusing set of facts may well have justified a trained officer in coming to the conclusion that a mentally unstable person might pose a threat to the President's well-being. No matter how reasonable such an officer's belief may have been, that kind of suspicion is not a substitute for a reasonable determination that the *evidence* established probable cause to arrest.

The District Court denied the petitioners' motion for summary judgment seeking dismissal on the ground of qualified immunity because it decided that further fact-finding was necessary. On such a motion, the court was of course required to resolve any disputed question of fact against the moving parties. In my opinion the Court of Appeals correctly stated the governing standards when it wrote:

"Qualified immunity is an affirmative defense for which the government official bears the burden of proof. *Harlow* v. *Fitzgerald*, [457 U. S. 800, 815 (1982)], *Benigni* v. *City of Hemet*, 853 F. 2d 1519 (9th Cir. 1988). As with all summary judgment motions, the evidence should be viewed in the light most favorable to Bryant as the nonmoving party; to prevail on their motion for summary judgment, the defendants must show that they were reasonable in their belief that they had probable cause. Bryant, however, bears the burden of proving that the right which the defendants allegedly violated was clearly established at the time of their conduct. . . .

". . . In order for a secret service agent reasonably to have believed he had cause to arrest Bryant, the agent must have been reasonable in his belief that Bryant's words and the context in which he delivered them were a serious threat against the president. *Watts* v. *United States*, [394 U. S. 705 (1969) *(per curiam)*].

"Whether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment or a directed verdict in a §1983 action based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach. *Kennedy* v. *L. A. Police Department*, 887 F. 2d 920, 924 (9th Cir.1989), *McKenzie* v. *Lamb*, 738 F. 2d 1005, 1008 (9th Cir.1984). Because qualified immunity protects government officials from suit as well as from liability, it is essential that qualified immunity claims be resolved at the earliest possible stage of litigation. *Mitchell* [v. *Forsyth*, 472 U. S. 511, 526 (1985)]. This necessarily expands the factfinding role that must be played by the district court judge. In some cases, district courts will be able to establish entitlement to qualified immunity before trial and, sometimes, even before discovery. . . . In some cases, however, further development of the record will be necessary. In this case it was proper for the court to require further development of the facts to determine whether the secret service reasonably could have interpreted the letter as violating §871." 903 F. 2d, at 720–721.

Like JUSTICE SCALIA, I am satisfied that the Court of Appeals applied the correct legal standard when it affirmed the District Court's refusal to grant summary judgment in favor of petitioners. When the Court of Appeals opinion is read in its entirety, that conclusion is inescapable. Unlike JUSTICE SCALIA, however, I am also satisfied that when the proper legal standards are applied to this record, with the evidence examined in the light most favorable to the nonmoving party, petitioners have not yet established that a reasonable officer could have concluded that he had sufficient *evidence* to support a finding of probable cause at the time of respondent's arrest. I also think it unwise for this Court, on the basis of its *de novo* review of a question of fact, to reject a determination on which both the District Court and the Court of Appeals agreed.

Accordingly, I respectfully dissent.

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SUPREME COURT OF THE UNITED STATES

BRIAN V. HUNTER AND JEFFERY JORDAN
v. JAMES V. BRYANT, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–1440. Decided December 16, 1991

JUSTICE KENNEDY, dissenting.

Petitioners in this case are agents of the Secret Service. Among the questions presented are the proper interpretation of 18 U. S. C. § 871(a), which prohibits mail threats against the President, and the proper standard for summary judgment on grounds of qualified immunity. Whether implied or expressed, our resolution of these questions will be parsed by the Service and by later courts. The importance of these questions suggests that we should not dispose of them in summary fashion.

For the reasons stated in today's per curiam opinion and in the dissent by Judge Trott in the Court of Appeals, I must agree that the holding of the Court of Appeals is open to serious question. The majority opinion of that court seems not to have considered all of the facts on which the agents relied, in particular the statements made by Bryant and his responses (or non-responses) to the agents' questions. This calls in question its determination that qualified immunity has not been established on summary judgment.

To reverse in this case, however, the Court considers an issue on which some doubt has been expressed, which is whether the Court of Appeals applied the correct legal standard to resolve the qualified immunity issue on summary judgment. Two members of the Court disagree with the statement in the per curiam opinion that the Court of Appeals misstated the law. See *ante*, at ___; *ante*,

2 pp

at ___ (SCALIA, J., concurring in the judgment); *ante*, at ___ (STEVENS, J., dissenting). Given this disagreement, as well as the precedential weight that later courts will accord to all of the questions presented in the case and addressed here in express terms or by clear implication, the case does not lend itself to summary disposition. I would set the case for full briefing and oral argument.

For these reasons, I dissent from the judgment of summary reversal in this case.